This is not an official transcript. Courses which are in progress may also be included on this transcript.

**Record of:** Andrew P. Nisco
**GUID:** 819897887

**Course Level:** Juris Doctor

**Transfer Credit:**
Pace University
School Total: 30.00
**Entering Program:**
Georgetown University Law Center
Juris Doctor
Major: Law

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2022** | | | | | | | |
| LAWJ | 025 | 05 | Administrative Law<br>Anita Krishnakumar | 3.00 | A- | 11.01 | |
| LAWJ | 121 | 05 | Corporations<br>Michael Diamond | 4.00 | A | 16.00 | |
| LAWJ | 1711 | 05 | Separation of Powers Seminar: Hot Topics in Scholarship<br>Josh Chafetz | 3.00 | B+ | 9.99 | |
| LAWJ | 178 | 07 | Federal Courts and the Federal System<br>Michael Raab | 3.00 | B+ | 9.99 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 13.00 | 13.00 | 46.99 | 3.61 |
| Cumulative | 43.00 | 13.00 | 46.99 | 3.61 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Spring 2023** | | | | | | | |
| LAWJ | 084 | 05 | Transnational Litigation: Conflict of Laws/Private International Law | 3.00 | A | 12.00 | |
| LAWJ | 1491 | 116 | ~Seminar | 1.00 | A | 4.00 | |
| LAWJ | 1491 | 118 | ~Fieldwork 3cr | 3.00 | P | 0.00 | |
| LAWJ | 165 | 07 | Evidence | 4.00 | A- | 14.68 | |
| LAWJ | 304 | 05 | Legislation | 3.00 | A | 12.00 | |
| LAWJ | 361 | 07 | Professional Responsibility | 2.00 | A | 8.00 | |
| In Progress: | | | | | | | |
| LAWJ | 1491 | 03 | Externship I Seminar (J.D. Externship Program) | | In Progress | | |

**Transcript Totals**

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 16.00 | 13.00 | 50.68 | 3.90 |
| Annual | 29.00 | 26.00 | 97.67 | 3.76 |
| Cumulative | 59.00 | 26.00 | 97.67 | 3.76 |

**End of Juris Doctor Record**

PACE UNIVERSITY

Elisabeth Haub School of Law



**Record of:** Andrew P Nisco
*** WARNING ***
--No Address--

**Date Issued:** 13-JUN-2022
**Social Security:** *****1130
**Student ID:** U01822056
**Level:** Law-JD
**Campus:** White Plains

**Issued To:** Andrew NIsco
237 Ridgefield Rd
Wilton, CT 06897

Course Level: Law-JD
Only Admit: Fall 2021

Current Program
College : School of Law - Full Time
Major : Law

| SUBJ | NO. | COURSE TITLE | CRED | GRD | PTS | R |
|---|---|---|---|---|---|---|
| INSTITUTION CREDIT: | | | | | | |
| Fall 2021 | | | | | | |
| LAW | 610A | Civil Procedure | 4.00 | A | 16.00 | |
| LAW | 621 | Criminal Law | 4.00 | A- | 14.68 | |
| LAW | 622C | Legal Skills I | 3.00 | A | 12.00 | |
| LAW | 631 | Torts | 4.00 | A | 16.00 | |
| Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 58.68 GPA: 3.91 | | | | | | |
| Spring 2022 | | | | | | |
| LAW | 601 | Contracts | 4.00 | A- | 14.68 | |
| LAW | 622D | Legal Skills II | 3.00 | A- | 11.01 | |
| LAW | 634 | Property | 4.00 | B+ | 13.32 | |
| LAW | 646 | Constitutional Law | 4.00 | A | 16.00 | |
| Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 55.01 GPA: 3.67 | | | | | | |

********** TRANSCRIPT TOTALS **********

| | Earned Hrs | GPA Hrs | Points | GPA |
|---|---|---|---|---|
| TOTAL INSTITUTION | 30.00 | 30.00 | 113.69 | 3.79 |
| TOTAL TRANSFER | 0.00 | 0.00 | 0.00 | 0.00 |
| OVERALL | 30.00 | 30.00 | 113.69 | 3.79 |

********** END OF TRANSCRIPT **********

UNOFFICIAL

June 15, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Andrew Nisco to your Court. I am an Assistant United States Attorney for the U.S. Attorney's Office – District of Connecticut. Mr. Nisco was a law clerk in our New Haven office in the summer of 2022. I had the opportunity to observe Mr. Nisco's work in a variety of situations and I am very impressed with his abilities.

Mr. Nisco is an excellent writer with a strong grasp of legal principles. Mr. Nisco worked on a complex summary judgment motion for me while handling multiple other projects for other attorneys. The summary judgment in question involved the application of both federal and administrative caselaw and Mr. Nisco did a great job. The drafts submitted to me required minimal editing. Mr. Nisco possesses the rare quality of knowing exactly when to push forward on his own and when to seek guidance; this made supervising him easy and pleasant. In addition, I have spoken to the other AUSAs that worked with Mr. Nisco and they share my assessment.

Mr. Nisco's independent work on this motion, and other projects, demonstrated his internal work ethic and professionalism. He successfully determined the best way to approach the record and the briefing and implemented him plan with minimal oversight. Moreover, when he sought help, he was well prepared.

I believe that Mr. Nisco would make an fine law clerk. Mr. Nisco worked well with his fellow law clerks and the support staff and was an enjoyable addition to our office. Given his intellect and diligence, I believe he would be an asset to your chambers. I greatly enjoyed working with him and I personally recommend him to your chambers. I would be happy to discuss his application further; my direct dial is (203) 821-3798 and my mobile number is (203) 507-5414.

Respectfully submitted,

/S/

David C. Nelson

Chief, Asset Forfeiture Unit

David Nelson - David.C.Nelson@usdoj.gov

**Georgetown Law**
600 New Jersey Avenue, NW
Washington, DC 20001

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my pleasure to recommend Andrew Nisco for a clerkship in your chambers. I had the opportunity to get to know Andrew while he was a student in my Legislation class this past year, and I can confidently say that Andrew is an exceptional student with great potential to provide meaningful contribution to your chambers. I encourage you to give him your most careful consideration.

Throughout the semester, Andrew exhibited his willingness to learn and inquisitive nature. Andrew's engagement with the readings assigned and course materials allowed him to stand out from his peers. As an appointed member of the President's Commission on the Supreme Court of the United States, I have greatly appreciated Andrew's contributions to our discussions and his insightful and intelligent commentary about statutory interpretation methods and the role of the judiciary. He consistently demonstrated a profound interest in the judicial process. This interest also manifested itself through his in-class participation as he consistently added value to discussions. Andrew's preparedness and participation in class earned him an A, one of many on his transcript.

Andrew also demonstrated a particular skillset in class that set him apart from his fellow classmates. As a portion of my students' grade, I have them teach a class for an hour with a partner. When Andrew presented, he exhibited a confidence with the material and with leading the class forward. He showed a strong ability to distill complex topics into an easily understood and cohesive lesson. During his presentation, he displayed strong public speaking skills as he conducted himself in a professional manner in front of the class. Additionally, I noticed at various points throughout the semester that Andrew had a strong ability to take the concepts learned throughout the course and apply them in the interpretation of statutes. This ability culminated in his strong performance on the final exam where he exhibited his interpretive acumen.

Ultimately, Andrew Nisco's robust legal analysis and thoughtful demeanor ensure he would be a pleasant and strong asset in your chambers. I am confident he will excel in his career, and I am excited to learn how his career progresses. I know that Andrew is passionate about the opportunity to serve as a judicial clerk, and I am certain that he has the skills and drive to not only succeed – but truly excel – in this role. If you have any additional questions or require further information, please do not hesitate to contact me at caroline.fredrickson@georgetown.edu.

Sincerely,

Caroline Fredrickson
Distinguished Visitor from Practice, Georgetown Law
Senior Fellow, Brennan Center for Justice
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**COVER PAGE**

This writing sample is from my time last summer at the US Attorney's Office for the District of Connecticut. I was tasked with writing a summary judgment brief on an immigration fraud case that involved federal and administrative caselaw. The brief has since been filed in the matter *Colgan v. Garland*. I have selected an excerpt from the full document, which can be provided if requested. The essential facts that the Government's argument relies upon are included in the excerpt.

this is an immigration fraud case arising out of the plaintiffs' (Ana Maria Tenorio Mejia and her husband, Leo Colgan) denied petition to gain United States Citizenship by the United States Citizenship & Immigration Service (USCIS). The plaintiffs brought an action to challenge the denial. After the amended complaints, the plaintiffs' advanced the following claims: the USCIS denial of Form I-130 Petition for Alien Relative was unlawful, improper, and based on flawed reasoning; and the Plaintiffs' Due Process rights were violated.

In writing this brief, the AUSA that assigned me the case, AUSA David Nelson, allowed me broad discretion and freedom to argue as I pleased and only made minor edits. As it pertains to the excerpt provided, I wrote the entire argument section of the brief and crafted the legal arguments advanced.

## IV. ARGUMENT

Fundamentally, the plaintiffs allege a violation of the immigration regulations and their due process rights. In making this argument, the plaintiffs point to two problems in the underlying decisions. Section A of this Brief addresses the argument that USCIS came to the incorrect decision when it rejected the I-130 petition. Section B of this Brief addresses the argument that USCIS violated the plaintiffs due process rights by not allowing them to rebut adverse evidence. The arguments as to both claims share significant overlap, and the Government requests the Court consider all arguments set forth below as to all the plaintiffs' allegations.

### A. The plaintiffs cannot demonstrate that USCIS erred in its decision to reject Colgan's Petition because the evidence submitted does not address the issues USCIS identified in the NOID, and USCIS relied on substantial and probative evidence to deny Colgan's Petition and subsequent appeals.

The Court should grant summary judgement in favor of the Government because the USCIS's decision was supported by substantial and probative evidence in the record. The evidence Colgan asked USCIS, and is now asking this Court, to give deference to has no nexus to the claim that Mejia's former marriage to Castro was not fraudulent.

When Castro filed the I-130 petition for Alien Relative on behalf of Ana Tenorio Mejia, Mejia also filed an I-485 Application to Adjust Status on December 15, 2015. 56(a)1 ¶ 5-6. On May 23, 2016, Castro and Mejia appeared for an interview as required by the petition. 56(a)1 ¶ 7. During the interview, there were numerous discrepancies between Castro and Mejia's answers to certain questions. Those discrepancies are as follows:

| Discrepancy # | Mejia's Version of Events | Castro's Version of Events |
|---|---|---|
| **1** | Michelle Corrales, Castro's 'sister-in-law,' introduced her to Castro | Mejia's grandmother made the introduction |

| | | |
|---|---|---|
| **2** | Mejia was the first person to make telephone contact with Castro after their exchange of numbers | Castro was the first person to make telephone contact with Mejia after their exchange of numbers |
| **3** | When Mejia told Castro she liked women, Castro ignored her and kept talking | When Mejia told her she liked women, Castro responded by saying that's a good thing and they should take the next step in their relationship |
| **4** | During Mejia's second visit to Connecticut, she and Castro consummated their marriage and that was in January or February of 2015 | The marriage was consummated on the day they got married, 05/29/2014, and that was the fifth time that Mejia had come to Connecticut |
| **5** | Mejia said that Ligia, a co-sponsor, is her second cousin, but she calls her aunt because she is older | Castro said that Ligia is Mejia's aunt |
| **6** | Castro started working with her employer prior to their meeting | Castro started working with her employer after meeting Mejia |
| **7** | Mejia did not know if Castro has a retirement account with her current job | Castro had a retirement account with her job |
| **8** | Mejia gets paid bi-weekly | Mejia gets paid weekly |
| **9** | Mejia gets paid by check | Mejia gets paid through direct deposit |
| **10** | Mejia puts her salary in her individual TD Bank account | Mejia's salary is directly deposited into her Citi Bank account |
| **11** | Castro went with Mejia to the DMV so Mejia could get her learner's permit | Mejia went alone to the DMV to get her learner's permit |
| **12** | Castro asked Mejia to marry her while they were in the living room of the house at the time | Castro asked Mejia to marry her while they were in the backyard of the house at the time |
| **13** | Castro has three children | Castro has four children |
| **14** | Castro did not give Mejia a ring when she proposed | Castro gave Mejia a Pandora ring when she proposed |
| **15** | Castro did not tell anyone of the proposal while in Mejia's presence | Castro told her sister-in-law of the proposal while in Mejia's presence |
| **16** | Mejia left for work the day before the interview at 6:30 a.m. | Mejia left for work the day before the interview at 6 a.m. |
| **17** | Castro works Saturdays 9 a.m. – 6 p.m. | Castro works Saturdays 9 a.m. – 5:30 p.m. |

56(a)1 ¶ 8-58. In addition to these inconsistencies, Castro admitted the marriage was fraudulent and withdrew her I-130 Petition. During the interview, she told the interviewer,

> Ana and I are very close friends, and I am sorry I lied about the marriage. I wasn't forced to do this, we looked online for the questions. It's not a safe place for her to go back and I depend on her help with my children. I'm sorry. We are not in a legit marriage. She asked me if she needed to pay she could. I said no payment. She told me I'd be her help for her Green Card.

56(a)1 ¶ 59. As a result of the contradictions unearthed by the interview and Castro's withdrawal statement, USCIS determined the marriage between Castro and Mejia was fraudulent "due to the inconsistent answers and lack of bona fide" relationship. 56(a)1 ¶ 60. The I-130 petition was withdrawn by Castro, and Mejia's I-485 application was denied on June 13, 2016, because USCIS determined she "entered into a fraudulent marriage in an attempt to obtain an immigration marriage." 56(a)1 ¶ 61.

Following alleged marital problems, Mejia and Castro divorced in November 2016. 56(a)1 ¶ 62. Prior to the divorce, Mejia began dating plaintiff Leo Colgan in July 2016. 56(a)1 ¶ 63. Mejia was introduced to Colgan's friends and family starting around Thanksgiving 2016, the same month she divorced Castro. Mejia and Colgan were eventually married by a justice of the peace in Katherine Colgan's backyard, in Glastonbury, Connecticut. 56(a)1 ¶ 64. On May 12, 2018, Mejia and Colgan had their church wedding at St. George Cathedral in Hartford, Connecticut. 56(a)1 ¶ 65. Interestingly, Mejia and Colgan recorded that this was the first marriage for them both on their Certificate of Marriage, despite Mejia's previous marriage to Castro. 56(a)1 ¶ 66.

In due course, Colgan submitted Form I-130, Petition for Alien Relative, to USCIS on behalf of Mejia. 56(a)1 ¶ 67. On July 24, 2019, USCIS responded to the petition by issuing a Notice of Intent to Deny (NOID). 56(a)1 ¶ 68. In the NOID, USCIS outlined the process to appeal the decision, reiterated their determination that the marriage between Castro and Mejia

was fraudulent, and discussed an interview they conducted with Mejia and Colgan regarding the I-130 petition. 56(a)1 ¶ 69-71.

In the interview, when questioned by USCIS about Mejia's previous marriage, Colgan said that Mejia's marriage with Castro fell apart because they did not love each other anymore. 56(a)1 ¶ 72. The NOID states that Colgan "did not provide any additional insight into the marital relationship" of Castro and Mejia. *Id.* Mejia responded to the same question by stating "that it was a legitimate marriage, and she did not marry Ms. Castro to obtain a green card. [She] went on to state that Jessica disappeared and abandoned her kids. She claims the paternal grandmother has custody of the children in Arizona." 56(a)1 ¶ 73.

The NOID also indicates that on April 4, 2019, USCIS officers contacted Castro regarding her previous marriage to Mejia. 56(a)1 ¶ 74. Castro stated the marriage was arranged by Michael Werner and Michelle Corrales when "Michael and Michelle asked her to help the beneficiary, Ana Tenorio Mejia, by marrying her and petitioning for her in exchange Ms. Mejia, would help Ms. Castro, with childcare." 56(a)1 ¶ 75-76. Castro also said that Mejia had her own separate room from Castro and her children, downstairs. 56(a)1 ¶ 77. She also noted that she was unaware of Mejia's relationship status and whether she was homosexual or bisexual. 56(a)1 ¶ 78. Similarly, Castro said she did not know much about Mejia because they did their own thing. 56(a)1 ¶ 79. Additionally. Castro said that she only married Mejia so that she could help Mejia, and to get help in taking care of the kids. 56(a)1 ¶ 80. Further, she mentioned that the only payment for the marriage was in the form of childcare, but that she was aware of payments between Mejia and Michelle and Michael. 56(a)1 ¶ 81.

Following a review of the interview, Castro's phone call, and all submitted affidavits and documents, USCIS noted that Colgan and Mejia "did not provide any additional information or

documentation demonstrating that the beneficiary's previous marriage was not entered into to obtain an immigration benefit." 56(a)1 ¶ 86. Most notably, USCIS noted that Colgan and Mejia failed to provide any evidence to government officials that would discredit Castro's testimony on two occasions. 56(a)1 ¶ 87. In the NOID, USCIS determined that there was substantial and probative evidence that indicated Mejia's marriage to Castro was "fraudulent and entered into for the sole purpose of circumventing the immigration laws." 56(a)1 ¶ 88. Then, USCIS found they were prohibited from approving Colgan's I-130 petition under INA § 204(c). 56(a)1 ¶ 89.

On August 22, 2019, Mejia and Colgan's counsel submitted a letter and additional evidence to respond to the USCIS NOID. 56(a)1 ¶ 91. In addition to the letter, several documents were submitted:

- An affidavit by Michelle Corrales
- An affidavit by Ana Maria Colgan (Mejia)
- An affidavit by Katrin Lengsavath
- An affidavit by Natalia Dudzinski
- A private investigation report looking into Jessica Castro
- A Valentine's Day Card from Castro to Mejia
- A copy of the appointment of the grandmother of Castro's children as their permanent guardian, and
- A parenting education form, signed by Mejia

56(a)1 ¶ 92, 95, 101, 104, 108, 111, 112, 113. On April 28, 2020, USCIS responded to the plaintiffs' letter and additional documents notifying them of another denial of the petition.

The denial letter stated that: (1) the affidavits submitted by Corrales, Lengsavath, and Dudzinski are the "weakest kind of evidence and hold little evidentiary value in establishing" Mejia's relationship to Castro; 56(a)1 ¶ 115; (2) the custody appointment letter has no evidentiary value in establishing a bona fide relationship between Mejia and Castro; 56(a)1 ¶ 116; (3) the affidavit from Mejia, while accepted into evidence, was insufficient to meet the burden of proof in immigration proceedings without supporting documents; 56(a)1 ¶ 117; (4) the

private investigator report has no evidentiary value in establishing a bona fide relationship between Mejia and Castro; 56(a)1 ¶ 118; (5) the court order for parenting education demonstrates that Mejia was ordered by the court to take part in the program; 56(a)1 ¶ 119; (6) and the record shows no evidence that there was any relationship between Mejia and her step-children. *Id*.

In Colgan's third amended complaint, the plaintiffs assert that "USCIS based its entire decision on an alleged statement by… Jessica Castro, in its decision it dismissed all the affidavits provided by the parties in response to the NOID as 'weakest form of evidence,' thereby undermining its own reliance on an alleged statement and an alleged phone call." Colgan complaint ¶ 25. The vast majority of the plaintiffs' claims arise from this paragraph, but it is not an accurate retelling of the case. In almost half (17/35) of the answers that Mejia and Castro provided in their interview contained discrepancies. These discrepancies include fundamental aspects to their relationship including where the proposal took place, whether a ring was given at the proposal, when the relationship was consummated, who made the first contact with the other, and who introduced them, just to name a few. The failure to have a cohesive and confirmatory interview is central to the ability to have a petition accepted, yet this fact is ignored by the plaintiffs. *See Mir v. Holder*, 374 F. App'x 95, 96 (2d Cir. 2010) (BIA denial of continuance proper because relief would ultimately be denied because sham marriage could be found based on "twelve inconsistencies between Mir's testimony and that of his wife during their *Stokes* interview"); *see also Morgan v. Gonzales,* 445 F.3d 549, 550 n. 1 (2d Cir. 2006).

As established in the preceding section, the director relied on relevant evidence to determine whether to reject a petition, while reaching their own independent conclusion based on that evidence. *See Matter of Tawfik*, 20 I.&N. Dec. at 168. USCIS also acknowledged that the decision to reject the appeal of the denial was based on Castro's statement she gave when

withdrawing the I-130 petition. This evidence has been recognized as being particularly persuasive in deciding whether there is "substantial and probative" evidence of prior marriage fraud. *See Ghaly,* 48 F.3d 1426. Significant discrepancies in answers to questions at the interview in conjunction to the statement by Castro at the interview that the marriage was fraudulent is additional substantial and probative evidence that the marriage was entered into fraudulently. The statement that "USCIS based its entire decision" on the Castro statement provided on April 4, 2019, is incorrect. USCIS had equally adequate and independent bases – apart from Castro's statement – to deny the petition. Based on this evidence, the BIA and USCIS's decision was not arbitrary and capricious.

Another central aspect of the plaintiffs' claim is that USCIS did not afford enough weight to the "relevant evidence" that the plaintiffs submitted for review. Colgan complaint ¶ 25. This view is misguided. USCIS directly responded to each piece of evidence the plaintiffs submitted. The complaint alleges USCIS "dismissed all the affidavits provided by the parties in response to the NOID as 'weakest form of evidence.'" *Id.* The only affidavits that were dismissed as the "weakest kind of evidence" were those submitted by Corrales, Lengsavath, and Dudzinski. 56(a)1 ¶ 115. The plaintiffs' characterization of the dismissal of the affidavits is also not in accord with the ruling precedent on the issue, where "affidavits alone will generally not be sufficient to overcome evidence of marriage fraud in the record without objective documentary evidence to corroborate the assertions made by the affiants." *Matter of P. Singh*, 27 I.&N. Dec. at 609. Additionally, USCIS was careful to include the fact that they held "little evidentiary value in establishing" the bona fide relationship between Mejia and Castro. *Id.*

The plaintiffs allege that the Government failed to show the substantial and probative evidence of marriage fraud; in reality, the USCIS decision was centered on the plaintiffs' failure

to satisfy their own standard of proof in establishing that the prior marriage was not entered into to evade immigration laws. *See* 8 C.F.R. § 103.2(b)(16)(i). The dismissal of such evidence, like the aforementioned affidavits, is merely indicative that the burden of proof placed upon the plaintiffs was not met.

It is imperative to understand what the affidavits alleged within them, so their inapplicability can be fully understood. The Michelle Corrales affidavit documented Ritalin and/or Adderall abuse by Castro during the latter part of the relationship with Mejia, in addition to mood swings, cheating, as well as abandonment of her children by Castro both before and after the divorce to Mejia. 56(a)1 ¶ 93-94. The Katrin Lengsavath affidavit merely documented that Lengsavath attended a bar and strip club with Mejia and Colgan in April 2015, and that she was informed of an argument because Castro refused to allow Mejia to use the car. 56(a)1 ¶ 105-106. The affidavit also documented that Mejia informed Lengsavath of marital issues, as well as Castro's abuse of prescription medicine. It also documented that Lengsavath housed Mejia after the separation and was later the maid of honor in the marriage to Colgan. 56(a)1 ¶ 107. The Natalia Dudzinski affidavit merely documented that Mejia hired her at IHOP, and that Dudzinski was a server for Mejia, Castro, and her children on one occasion. 56(a)1 ¶ 109-110. None of the affidavits provide objective or direct evidence to counter the discrepancies from the interview or the withdrawal statement made by Castro. Rather, the Lengsavath and Corrales affidavits attempt to discredit Castro by demonstrating her addiction to drugs and for her infidelity. Attacking the character and actions of a former spouse does nothing to demonstrate that there was a bona fide relationship.

Furthermore, the plaintiffs' claim is underinclusive because USCIS did not dismiss the affidavit submitted by Mejia. The affidavit documented (1) the relationship history between

Mejia and Castro; (2) the Ritalin and/or Adderall abuse by Castro; (3) the incident where Castro refused to let Mejia borrow her car to get to work; (4) that Castro and Mejia were separated before the interview with USCIS took place; (5) that Castro had not disclosed to Mejia that she withdrew the petition and informed USCIS that the marriage was not bona fide; (6) that Castro and Mejia officially separated and began the divorce process; and (7) that Mejia insisted Castro attend the Parenting Education Program for divorcing parents. 56(a)1 ¶ 95-100. Contrary to what the plaintiffs assert, USCIS determined that Mejia's affidavit was accepted into evidence, but was ultimately insufficient to meet the burden of proof in immigration proceedings without supporting documents. 56(a)1 ¶ 117. This is understandable because nothing in the affidavit undercut the discrepancies in the interview or Castro's statements.

USCIS found the other pieces of evidence submitted by the plaintiffs to appeal the decision were ultimately unpersuasive and did not meet the burden of proof. The denial letter stated that the custody appointment letter has no evidentiary value in establishing a bona fide relationship between Mejia and Castro, as it was not about their relationship. The letter stated that the private investigator report has no evidentiary value in establishing a bona fide relationship between Mejia and Castro, as it sought to impugn Castro's character. Also, the letter stated that the court order for parenting education only demonstrated that Mejia was ordered by the court to take part in the program. 56(a)1 ¶ 116-119. The letter also stated that the parenting education course shows no evidence that there was any relationship between Mejia and her stepchildren, and "that the intentions of the parties cannot be reasonably inferred from this document and this document *does not help establish that the marriage was entered into in good faith*." 56(a)1 ¶ 119 (emphasis added).

USCIS was looking for objective evidence that would convince them that the marriage was entered into in good faith. Instead, it received affidavits from a waitress who served the couple on one occasion, numerous documents attempting to discredit Castro, a Valentine's Day Card, and a parenting education form that was ordered by the Court. The phone call to Castro was conducted to confirm the allegations she made when she withdrew the I-130 Petition. The substantial and probative evidence was already provided, and the Director came to a decision looking at all the facts, clearly explaining why the evidence submitted did not change USCIS's conclusion. Because USCIS did not fail "to consider an important aspect of the problem," did not offer "an explanation for its decision that runs counter to the evidence before the agency," and its decision was not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise," USCIS met its standard, and was not arbitrary or capricious in its denial of Mejia and Colgan's petition. *Westchester*, 802 F.3d at 431.

Therefore, the evidence submitted by the plaintiffs fails to address the issues USCIS identified in the NOID, and USCIS relied on substantial and probative evidence to deny Colgan's Petition and subsequent appeals, contrary to the allegations made by the plaintiffs. The Court should grant summary judgement to the defendants as to these allegations.

**B. Colgan cannot demonstrate that USCIS violated his Due Process Rights because he had the chance to appeal and rebut the evidence, and even if the Court finds that does not suffice, USCIS is not obligated to share the adverse evidence.**

USCIS's process appropriately protected the plaintiffs' due process rights. The plaintiffs assert that under 8 CFR § 103.2(b)(16) they must have the "opportunity to examine and rebut adverse evidence" in an appeal and that the failure to provide that opportunity was a violation of their due process rights. Colgan complaint ¶ 38-39.

These claims simply misapply the law and precedent on this issue. The plaintiff's complaint comes from the phone call USCIS conducted with Castro in which she provided additional information on the sham marriage. As previously discussed, USCIS is not required by the regulations to provide a petitioner with the actual documents of the adverse evidence, in this case, the notes from the call with Castro. *See In re Liedtke*, A070 656 080. Rather, merely advising the petitioner that there is adverse evidence in its possession will suffice. Additionally, only "derogatory information considered by the Service and of which the applicant or petitioner is unaware" is subject to the notice requirement in 8 CFR § 103.2(b)(16). Mejia was aware that Castro informed USCIS the marriage was fraudulent in 2016. Mejia was aware of the information provided in the Castro phone call. The call merely confirmed the statement Castro made at the interview where she provided the interviewer with information that the marriage was fraudulent. Thus, since the information provided was not new, there was no need to inform the plaintiffs that the call took place. Therefore, the premise that due process rights were violated because the plaintiffs did not have the opportunity to examine the evidence is misguided.

Even if the Court finds that there was new information derogatory enough to trigger the notice requirement of the Code, the plaintiffs' claim would still fail because there was no constitutional right violated. The analysis turns to determining whether the plaintiffs' due process rights were violated by not having the opportunity to rebut the Castro phone call. In the Second Circuit, if there is no underlying fundamental constitutional or statutory right in the regulation's contents, a violation of that regulation does not constitute a basis for violating due process rights "unless petitioners can establish that the violation prejudiced rights ... protected by the subject regulation." *Ali*, 524 F.3d at 149. The key weakness with the plaintiffs' contention is that they have been afforded the opportunity to rebut the original statement that Castro made to

the USCIS officer at the interview, yet consistently failed to provide any evidence that would establish the marriage was entered into for good faith reasons.

Furthermore, the plaintiffs had the opportunity to rebut the phone call with Castro following the NOID. 56(a)1 ¶ 90. The NOID outlined the phone call and stated, "You are requested to submit additional evidence that resolves the deficiencies discussed above. . . . You are afforded thirty (30) days to submit any evidence to refute the allegations of this letter to overcome the grounds of denial discussed in this Notice of Intent to Deny." Record of Proceedings, doc. #28, pg. 216. The plaintiffs submitted evidence but failed to provide evidence to rebut the phone call, the very thing the plaintiffs are arguing they did not have the opportunity to do. *Id*. at pg. 254-55. The inability to rebut the phone call is the basis for the plaintiffs' Due Process claim. Not only did the plaintiffs have the opportunity to rebut the phone call and failed to do so, but they also showed no indication that they could provide evidence to rebut the call. Thus, there was no underlying constitutional violation.

The Government provided notice, the evidence in question was merely repetitive of evidence previously provided, the plaintiffs had the opportunity to provide rebuttal evidence, and, when given the opportunity, they failed to provide rebuttal evidence. The Court, therefore, should grant summary judgement for the defendants as to these allegations.

## V. CONCLUSION

The Government respectfully requests that the Court enter summary judgment in its favor on all the plaintiffs' remaining claims. The plaintiffs' allegations in support of their claim that USCIS acted not in accord with the facts runs contrary to the facts that are in the record and are at hand. The plaintiffs' claim regarding the Due Process violation has no basis from the statute they rely upon. Moreover, there is no indication from the record that the plaintiffs would have

been able to rebut the phone call with Castro even if it triggered the notice requirement. Additionally, the plaintiffs failed to rebut the phone call when the opportunity arose. For these reasons, the Court should enter summary judgment on all the plaintiffs' claims.

## Applicant Details

| | |
|---|---|
| First Name | **Matthew** |
| Last Name | **Niu** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **niu.matthew@gmail.com** |
| Address | **Address**<br>Street<br>**4511 Avondale Street #204**<br>City<br>**Bethesda**<br>State/Territory<br>**Maryland**<br>Zip<br>**20814**<br>Country<br>**United States** |
| Contact Phone Number | **8014103686** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Brigham Young University** |
| Date of BA/BS | **December 2020** |
| JD/LLB From | **American University, Washington College of Law**<br>**http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010** |
| Date of JD/LLB | **May 19, 2024** |
| Class Rank | **25%** |
| Law Review/ Journal | **Yes** |
| Journal(s) | **The Administrative Law Review**<br>**The Texas Review of Law and Politics** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

| | |
|---|---|
| Specialized Work Experience | **Habeas** |

## Recommenders

Frost, Amanda
afrost@law.virginia.edu
Rotenberg, Mark
mrotenberg@hillel.org

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Matthew Niu**
4511 Avondale St. #204, Bethesda MD
niu.matthew@gmail.com | 801-410-3686

June 16, 2023

Chief Judge Juan R. Sanchez
U.S. District Court
Eastern District of Pennsylvania
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sanchez,

I am a rising third-year law student at the American University Washington College of Law. I appreciate the diversity and quality of the cases that come before your court, and the excellence of your legal reasoning and writing. I am therefore eager to apply to be your law clerk beginning September 2024.

Last summer I worked at Orrick, Herrington & Sutcliffe L.L.P. in D.C., researching, analyzing, and drafting legal memoranda on issues ranging from torture and evidence in a Guantanamo Bay case to Daubert motions in the Ninth Circuit. I contributed to several practice groups. My experiences at Orrick taught me how to research and synthesize the law and produce clear legal writing to convey my analysis.

I am currently working at Joint Base Andrews with the Air Force J.A.G. Corps practicing information, personnel, constitutional, and labor law. My work supports the Department of Justice in COVID-19, First Amendment, and F.O.I.A. cases before the U.S. Circuit Courts of Appeals and U.S. District Courts. I also draft motions for summary judgment before the E.E.O.C.

Later this summer, I will return to Orrick to further hone my legal research and writing skills. I will then begin an externship with Senior Judge Royce C. Lamberth on the U.S. District Court for the District of Columbia during the fall semester. I hope to bring the lessons that I learn from my experiences to your chambers in 2024.

I have included my resume, transcript, letters of recommendation, and a writing sample in this application. Thank you for your consideration. I would be happy to interview with you or your clerks at your convenience.

Sincerely,

Matthew Niu

**Matthew Niu**
4511 Avondale St. #204, Bethesda MD
niu.matthew@gmail.com | 801-410-3686

## EDUCATION

**American University Washington College of Law** — Washington, D.C.
*Juris Doctor Candidate* | GPA: 3.53 | *Top 33%* — May 2024

- Journals: Senior Staffer – Administrative Law Review; Guest Executive Editor – Texas Review of Law and Politics
- Activities: Director of Speakers – The Federalist Society; Tech, Law, and Security Society; President – The Freedom of Belief Legal Society
- Honors: Merit Scholarship; Certificate of Excellence – AUWCL Legal Rhetoric and Writing Program; Notices of Superior Work Volumes 75.2 & 75.3 Spading – Administrative Law Review
- Fellowships: 2022 J. Reuben Clarke Law Society Religious Liberty Fellowship

**Brigham Young University** — Provo, UT
*Bachelor of Arts* in International Relations & Russian — December 2020

- Honors: 2017 Dean's List; Exemplary Regent's Scholarship; Humanities Scholarship
- Study Abroad: Russian Presidential Academy of National Economy and Public Administration studying Russian and politics, Moscow, Russia (Fall 2017)

## JUDICIAL WORK EXPERIENCE

**U.S. District Court for the District of Columbia** — Washington, D.C.
*Judicial Extern* — August 2023 – December 2023

- Will support Senior Judge Royce Lamberth and his law clerks in legal research and writing opinions

## LEGAL WORK EXPERIENCE

**U.S. Air Force JAG Corps** — Joint Base Andrews, MD
*Legal Extern* — Summer 2023

- Practicing constitutional, personnel, information law at the federal district and circuit court levels

**Orrick, Herrington & Sutcliffe LLP** — Washington, D.C.
*Summer Associate* — Summers 2022, 2023

- Drafted memoranda on legal precedent on torture and evidence in Guantanamo Bay habeas cases
- Reviewed, edited, and drafted Series B funding documentation
- Summarized COVID-19 class action docket scheduling
- Drafted memoranda for motions in limine supporting ongoing complex litigation
- Will work in the general litigation practice group

**Glassdoor** — Washington, D.C.
*Legal Intern* — Summer 2022

- Drafted and revised an amendment to a sister-company master services agreement
- Reviewed and provided feedback for vendor agreements, marketing strategies
- Participated in mid-sized tech political lobbying meetings in DC and the United Kingdom

**Professor Amanda Frost: AUWCL** — Washington, D.C.
*Research Assistant* — Summer 2022

- Analyzed Supreme Court case data surrounding the 1898 *Wong Kim Ark* case
- Researched, analyzed, and drafted memoranda on Thaddeus Stevens, sailor impressment in 1800s

## SKILLS & INTERESTS

**Languages**: Russian (fluent) | **Interests**: Artificial Intelligence, Movies, Cello, dog-sitting my puppy Sam

NIU MATTHEW K 5231907 11/01

06/10/23 1 OF 1



FALL 2021

| | | | | |
|---|---|---|---|---|
| LAW-501 | CIVIL PROCEDURE | 04.00 | A- | 14.80 |
| LAW-504 | CONTRACTS | 04.00 | A- | 14.80 |
| LAW-516 | LEGAL RESEARCH & WRITING I | 02.00 | B+ | 06.60 |
| LAW-522 | TORTS | 04.00 | B+ | 13.20 |

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 49.40QP 3.52GPA

SPRING 2022

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|---|---|---|---|---|
| LAW-503 | CONSTITUTIONAL LAW | 04.00 | A- | 14.80 |
| LAW-507 | CRIMINAL LAW | 03.00 | B+ | 09.90 |
| LAW-517 | LEGAL RESEARCH & WRITING II | 02.00 | B+ | 06.60 |
| LAW-518 | PROPERTY | 04.00 | A- | 14.80 |
| LAW-795LF | LAWYERING FUNDAMENTALS | 02.00 | A- | 07.40 |

LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 53.50QP 3.56GPA

FALL 2022

| | | | | |
|---|---|---|---|---|
| LAW-508 | CRIMINAL PROCEDURE I | 03.00 | B+ | 09.90 |
| LAW-611 | BUSINESS ASSOCIATIONS | 04.00 | A- | 14.80 |
| LAW-633 | EVIDENCE | 04.00 | A- | 14.80 |
| LAW-695 | CIVIL TRIAL ADVOCACY | 03.00 | A | 12.00 |
| LAW-770F | ADMINISTRATIVE LAW REVIEW I | 01.00 | -- | --.-- |

LAW SEM SUM: 15.00HRS ATT 14.00HRS ERND 51.50QP 3.67GPA

SPRING 2023

| | | | | |
|---|---|---|---|---|
| LAW-550 | LEGAL ETHICS | 02.00 | A | 08.00 |
| LAW-601 | ADMINISTRATIVE LAW | 03.00 | B+ | 09.90 |
| LAW-628 | CRIMINAL PROCEDURE II | 03.00 | B+ | 09.90 |
| LAW-643 | FEDERAL COURTS | 04.00 | B | 12.00 |
| LAW-770S | ADMINISTRATIVE LAW REVIEW I | 01.00 | -- | --.-- |
| LAW-795PY | CONST POWERS OF THE PRESIDENCY | 03.00 | A- | 11.10 |

LAW SEM SUM: 16.00HRS ATT 15.00HRS ERND 50.90QP 3.39GPA

FALL 2023

| | | | | |
|---|---|---|---|---|
| LAW-688 | PATENT LAW | 03.00 | -- | --.-- |
| LAW-847 | APPELLATE ADVOCACY | 03.00 | -- | --.-- |
| LAW-920 | REGULATION OF EMERGING TECH | 03.00 | -- | --.-- |

LAW CUM SUM: 60.00HRS ATT 58.00HRS ERND 205.30QP 3.53GPA

END OF TRANSCRIPT

June 16, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Matthew Niu for a judicial clerkship. Matthew was among the strongest students in my Civil Procedure class, and then was a stand-out summer research assistant. He is a strong writer and analytical thinker, as well as a thoughtful and responsible person. I think he would be a valuable addition to chambers.

Matthew was a student in my 80-person Civil Procedure class during his first semester in law school at American University. (I have recently moved to the faculty of the University of Virginia School of Law; Matthew was my student in 2021, when I was still teaching at American University). I require all of my students to complete three written assignments during the semester: a draft complaint based on a hypothetical set of facts; a draft answer to that complaint; and a complicated personal jurisdiction question in the role of a law clerk. I also assign the students multiple hypotheticals over the course of the semester, which we discuss in class, and I cold-call on roughly 20% of the students each class as well as take volunteers. Finally, using quizzes, discussion threads, and other short assessments, I monitor the students closely throughout the semester. The students are assessed on the basis of their performance on written assignments, their class participation, and their performance on a four-hour open-book final exam. Although the class is large, by the end of the semester I have a good sense of each student's abilities based on these assignments and their participation in class.

Matthew was one of the strongest students in the class. He was an exceptionally active class participant, and regularly attended my office hours to ask questions about the material. He did well on the written assignments, which he always handed in before the deadline. He also showed an intellectual interest in the subject, and a great enthusiasm for mastering the skills and knowledge needed to be a terrific lawyer. I was not surprised that he did very well on the final exam. I also had the pleasure of getting to know Matthew during office hours. He is an exceptionally mature and thoughtful student, and a thoroughly nice person.

I was so impressed by Matthew's performance in my class that I hired him to be my summer research assistant. He performed exceptionally well on several complicated assignments. I asked him to read closely the Supreme Court's convoluted decision in United States v. Wong Kim Ark establishing birthright citizenship, and then examine other decisions from that same 1898 Supreme Court term. He also investigated the use of amicus briefs during the 1898 Term to determine whether the involvement of amicus in the Wong Kim Ark case was unusual. We also discussed at length constitutional issues raised by the Wong Kim Ark case related to the Fourteenth Amendment, originalism, birthright citizenship, and the strategies of cause lawyers. He was responsible and proactive, and he did an excellent job on every task assigned. I would happily hire him again if I could.

In sum, I am confident that Matthew will be an excellent law clerk. Please feel free to contact me if you have any further questions about Matthew that I can help to answer.

Sincerely,

Amanda Frost
Professor of Law
University of Virginia

**Matthew Niu**
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niu.matthew@gmail.com | 801-410-3686

**SAMPLE BENCH MEMORANDUM**

**To:** Judge _____
**From:** Matthew Niu
**Date:** June 16, 2023
**Re:** *Pasha v. Grant* | No. 19-CIV-208395
**Rec.:** Affirm in part, Reverse in part and Remand

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## EXECUTIVE SUMMARY

Huck Pasha is an inmate at Quinnfield Penitentiary and a practicing Jain. Jains have many dietary restrictions, especially during their week-long holy days. Quinnfield, though, did little to accommodate those dietary restrictions. So Pasha ate very little during the holy days, and he got hungry.

Hunger soon turned to anger, which Pasha expressed in a letter to the Jain Center of America. The letter included inflammatory words like "torture" and "riot," so Quinnfield censored the letter. Pasha then sued Quinnfield and its warden (Grant), alleging free-exercise and free-speech violations.

The District Court granted Quinnfield's summary judgment motion. It determined that Pasha's free-exercise claim failed because the Prison Litigation Reform Act does not allow compensatory damages for free-exercise violations. And it determined that his free-speech claim failed because Quinnfield's censorship policies were reasonable under the deferential *Turner* standard. Pasha appealed.

We should affirm on the free-exercise claim. The PLRA conditions compensatory damages on physical injuries, and hunger is not a physical injury. The statute creates no exception for First Amendment violations. Some circuits have read this exception into the statute, but we should not do so. The exception finds no support in the PLRA's text, and Pasha can still seek punitive and nominal damages. So claimants like Pasha can still receive damages for First Amendment violations when the PLRA bars compensatory damages.

We should reverse and remand on the free-speech claim. The District Court should have applied the *Martinez* standard, not the *Turner* standard, to evaluate the prison's censorship policies. The *Martinez* standard applies to outgoing-mail cases specifically. This is an outgoing mail case.

Even if we did apply *Turner*, a genuine issue of material fact would remain. Pasha presented evidence that Quinnfield fails the second *Turner* prong. The District Court ignored that evidence and Pasha's related arguments.

For these reasons, we should affirm the District Court's ruling on the free-exercise claim under the PLRA, reverse its ruling adopting the *Turner* standard, and remand for further consideration on Pasha's genuine issue of material fact.

## Table of Contents

## I. BACKGROUND

### A. The Story

Huck Pasha is a Jainist prisoner at Quinnfield Penitentiary. JA 7. Fitzgerald Grant is Quinnfield's warden.

Jainists follow a strict diet. JA 7. They eat neither root vegetables nor animal products. *Id.* Jainists observe week-long holy days during which they have further dietary restrictions and fast from dusk to dawn. *Id.*

Quinnfield did not accommodate Pasha's dietary restrictions during holy days. For five days, Pasha could eat just small parts of only four meals. JA 19. These included a banana, French toast, strawberries, beans, and rice. *Id.* So Pasha was very hungry but not physically injured. JA 21.

Pasha got angry and wrote a letter about the incident to the Jain Center of America, cc'ing a prison news organization. The letter used words like torture and riot. Quinnfield's censorship policy states that "prison officials . . . should censor any potentially dangerous mail, including mail containing illicit materials, posing a security risk or social unrest within the prison, or misrepresenting conditions or events within the prison." JA 22. Quinnfield believed the letter could incite violence and mischaracterized prison conditions, so it censored the letter. JA 4. Pasha sued Quinnfield and its warden.

### B. Procedural History

The plaintiff's complaint asserted two causes of action arising under the First Amendment: a free-exercise and free-speech claim. JA 12. The District Court granted the defendant's motion for summary judgment on both claims. *Id.* On the free-exercise claim, the court reasoned that the Prison Litigation Reform Act ("PLRA") precluded compensatory damages because plaintiff's injuries were non-physical. JA 13. As to the unconstitutional censure claim, it adopted the *Turner* standard for reviewing prison policies and decided that defendant's censuring plaintiff's outgoing mail was reasonable under *Turner*. *See* JA 12-15.

## II. THE LAW

### A. Prison Litigation Reform Act

The PLRA requires prisoners show a physical injury before bringing a federal civil action "for mental or emotional injury suffered while in custody . . . ." 42 U.S.C. § 1997e(e). But the PLRA neither defines "mental or emotional injury" nor specifies

whether the nature of the relief sought, or the substantive violation controls the interpretation of the statute. *See id.* § 1997. If the nature of the relief sought (category of damages) is dispositive, then claimants may not recover compensatory damages for non-physical injuries. If the substantive violation (constitutional rather than non-constitutional violations) is dispositive, then claimants may recover compensatory damages for non-physical injuries. Our circuit has no precedent that deals with this issue.

#### *1. Nature of Relief Sought as Dispositive*

"Nature of the relief sought" analysis focuses on compensatory damages for injuries suffered. Reading the statute this way views *any* non-physical injury under the umbrella of mental or emotional damages because if an injury exists and is non-physical, then it can only be mental or emotional. The statute bars compensatory damages for mental and emotional injuries. *See* § 1997e(e).

#### *2. Substantive Violation as Dispositive*

"Substantive violation" analysis focuses on categories of suffering. The statute does not specifically categorize constitutional violations as mental or emotional injuries. So, a non-physical injury that has resulted in mental or emotional damage may also be a constitutional violation which is not precluded from receiving compensatory damages because it is not enumerated in the statute.

#### *3. Interpretation Method Comparison*

Interpreting the statute by the nature of the relief sought is the most natural reading of the statute. Any non-physical injury is covered by mental or emotional injuries, even constitutional violations. Interpreting the statute by the underlying substantive violation is extra-textual. This interpretation forms a protected constitutional violation category for compensatory damages.

### B. Judicial Deference to Prison Policies Censoring Outgoing Mail

There are two possible standards of review to determine the level of judicial deference to prison mail censorship policies: (1) the *Martinez* standard; and (2) the *Turner* standard. *See Procunier v. Martinez*, 416 U.S. 396, 411 (1974); *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). Our circuit has never weighed in on which applies when.

#### *1. Martinez Standard*

Under *Martinez*, courts examine two elements: (1) the government interest in pursuing the policy must be either important or substantial, and (2) the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. 416 U.S. at 411. This

standard applies to outgoing mail censorship cases only. *See Thornburgh v. Abbott*, 490 U.S. 401, 411-12 (1989).

#### *2. Turner Standard*

Under *Turner*, courts apply a four-part test: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest used to justify it, (2) whether there are other ways to exercise the First Amendment right that remain open to prison inmates, (3) the effect that accommodating the asserted constitutional right will have on guards, other inmates, and allocation of prison resources generally, and (4) whether there are viable alternatives to the prison regulation. 482 U.S. at 89-91.

#### *3. Big Differences between the Standards*

The *Martinez* standard is exacting because it requires the government to limit First Amendment violations to those which are necessary for important or substantial interests. *See* 416 U.S. at 411. The *Turner* standard is more of a reasonableness standard because the government must show alternatives to actions taken by both parties, the effect of accommodation, and a rational connection between the policy and valid interest. *See* 482 U.S. at 89-91.

## III. THE ISSUE

Pasha and Quinnfield disagree on (A) how to interpret the PLRA, (B) whether the *Martinez* or *Turner* standard applies, and (C) whether genuine issues of material fact exist under either standard. *See* JA 2; JA 10-11.

### A. PLRA Plain Language Interpretation

The plain language of the PLRA bars Pasha from receiving compensatory damages in the absence of physical injury. § 1997e(e). Pasha suffered no physical injury, so he cannot receive compensatory damages. The statute makes no exceptions, and we should create none.

#### *1. The court should not create an exception.*

Most circuits follow the PLRA's plain language. The nature of the relief sought controls the interpretation. *See Allah v. Al-Hafeez*, 226 F.3d 247, 250 (3d Cir. 2000); *Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005). Any non-physical injury mental or emotional, even constitutional injuries. *See id.*

Other circuits interpret the statute by the type of violation. *See Rowe v. Shake*, 196 F.3d 778, 781 (7th Cir. 1999); *King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015). This requires the court to read into the statute an extra-textual category of protected constitutional violations for which a prisoner may recover compensatory damages

even without physical injuries. These courts reason that Congress could not have meant to preclude prisoners from receiving compensatory damages based on free-exercise violations, which are almost always non-physical. *See Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999).

The former circuits are correct for two reasons: (a) the court should interpret the statute as plainly written, and (b) Pasha can seek nominal or punitive damages. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803); *United States v. Nishiie*, 996 F.3d 1013, 1028 (9th Cir. 2021); *Allah*, 226 F.3d at 250 (3d Cir. 2000).

***a) The court should interpret the statute as plainly written.***

The PLRA states that claimants may not recover compensatory damages for non-physical injuries. The minority circuit interpretation requires the court to read into the statute an exclusion for constitutional violations. That is not the role of the court. The court's duty is to say, "what the law is," not what the court wishes it to be. *See Marbury*, 5 U.S. at 177. This circuit follows this judicial approach. *See Nishiie*, 996 F.3d at 1028. Sympathetic courts rightly seek to grant justice where harmed parties are aggrieved but they are bound when Congress fails to confer those rights. The court must "expound and interpret" rules but it cannot create an exclusion where Congress' statute explicitly states otherwise. *Id.* This is not interpretation. This is judicial legislation.

***b) Interpretation by the plain language of the statute does not preclude all of Pasha's potential damage awards.***

Pasha is not precluded from all damage awards. He can still seek punitive and nominal damages. In *Allah*, the prisoner sought compensatory damages for a free-exercise violation by the prison chaplain and the appointed outside minister. *See* 226 F.3d at 250. The Third Circuit held that the prisoner could seek punitive and nominal damages for a violation of his First Amendment rights but could not seek compensatory damages under § 1997e(e). *See id.*

In *King*, the prison retaliated against the inmate who exercised First Amendment rights by placing him in a higher-security facility. 788 F.3d at 213. Pasha's case is different from the inmate in *King* because Quinnfield did not retaliate against Pasha for exercising his First Amendment rights. *See id.* Quinnfield did not move the Pasha to a higher security facility like the prison moved the inmate in *King*. *See id.*

***B. Martinez* v. *Turner***

The court has two options when it comes to the *Martinez* and *Turner* standards: (1) apply the *Turner* standard based on recent Supreme Court precedent and the fact

that prisons have local expertise on resources and security management, or (2) apply the *Martinez* standard based on facts confined to outgoing mail cases. The latter is more persuasive.

The court need not establish an overall standard based on this case. Because this case is limited to outgoing mail, it may not be representative of most cases that come before the court. The *Turner* standard likely applies to most prison censorship policies but is inappropriate here because *Turner* and its progeny's factual context is grossly dissimilar to those here. To achieve justice here and avoid setting outdated precedent (and thus open the court to risk of reverse), the court can apply *Martinez* and specifically limit its applicability to the facts presented because (1) this is an outgoing mail censorship case, (2) the facts resemble *Martinez*, and (3) *Turner* does not fit the context of the case.

#### *1. Applying Turner because it is the most recent precedent and prisons have local expertise on resources and security management.*

The Supreme Court most recently adopted the deferential *Turner* stance on prison policies. *See Thornburgh*, 490 U.S. at 407–08 ("We give considerable deference to a prison official's determination that a communication between a prisoner and the outside world constitutes a security threat."). Several circuits follow this deferential standard. *See United States v. Felipe*, 148 F.3d 101, 108 (2d Cir. 1998) ("[T]he interception of a defendant's prison correspondence does not violate that individual's First or Fourth Amendment rights if prison officials had 'good' or 'reasonable' cause to inspect the mail."); *Williams v. Mierzejewski*, 401 F. App'x 142, 145 (7th Cir. 2010) (citing *Thornburgh*'s holding).

This circuit should not apply a legal standard only because it is the most recent precedent when the context of those cases is factually dissimilar to previous precedent. The context of this case departs radically from recent Supreme Court and subsequent sister-circuit cases. *See infra* Part III.B.2, at 9.

Additionally, Quinnfield asserts running a prison is difficult and requires local expertise for resource and security management. *See Turner*, 482 U.S. at 84-85 ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources . . . of the legislative and executive branches . . . ."); *Thornburgh*, 490 U.S. at 407 ("[P]rison officials may well conclude that . . . seemingly innocuous [interactions] have potentially significant implications for the order and security of the prison . . . [T]he judiciary is "ill equipped" to deal with the difficult and delicate problems of prison management . . . .").

This assertion is unpersuasive. Under *Turner*, the government interest needs to be valid and legitimate. *See* 482 U.S. at 89. There is no valid security interest achieved by the outgoing mail censorship policy here under *Turner* because

Quinnfield misconstrues the cases it relies on for the security interest. JA 9. Quinnfield relies on cases from the seventh and second circuits that a state security concern is enough to censor outgoing mail. *See* JA 5; *Mierzejewski*, 401 F. App'x at 145; *Felipe*, 148 F.3d at 108 (2d Cir. 1998). Pasha points out that the context of those cases are inmates involved in gangs sending correspondence to gang members outside the prison (presumably with nefarious designs). *See* JA 9; *Mierzejewski*, 401 F. App'x at 143; *Felipe*, 148 F.3d at 105. Quinnfield implicitly argues that these cases establish a high-water mark rather than a legal floor in terms of dangerous speech because the policies in *Turner* censored correspondence between inmates at different prisons with no gang relationship.

But Quinnfield also relies on *Thornburgh* when the Court explicitly says that "[t]he implications of outgoing correspondence for prison security are of a categorically less magnitude than the implications of incoming materials." 490 U.S. at 413. The case does not say how small a security concern outgoing mail can be. It does give categories of outgoing correspondence that are more likely to be considered dangerous including: escape plans, plans relating to ongoing criminal activity, and threats of blackmail or extortion. *Thornburgh*, 490 U.S. at 412. Pasha's letter clearly does not fall into any of these categories.

The District Court accepted security as a valid governmental interest for censoring outgoing mail because it was neutral to all groups and forms of expression and because "prison management is a difficult and complex task." *See* JA 14-15. But the security interest is low in outgoing mail cases and specifically here because the letter was addressed to the Jain Center of America and posed no danger to those inside the prison. JA 10. So the security concern here is legally *de minimis*.

***2. Applying Martinez because of factual similarity.***

First, *Martinez* applies to outgoing mail cases. 416 U.S. at 399. This is an outgoing mail case. JA 14. Quinnfield contends that *Martinez* is so limited in scope as to be inapplicable. But the Court in *Thornburgh* explicitly affirmed that *Martinez* is limited to outgoing mail cases only. 490 U.S. at 413 ("[T]he logic of our analyses in *Martinez* and *Turner* requires that *Martinez* be limited to regulations concerning outgoing correspondence.").

Second, the facts here closely resemble those in *Martinez*. *See* 416 U.S. at 398-400. The regulations in *Martinez* were faulty because they barred unduly complaining, magnifying grievances, or expressing inflammatory political, racial, religious or other views or beliefs. *See id.* at 399-400. The regulations lacked an appeal process and therefore violated the 14th amendment's due process requirements. *See id.* at 421. Here, Quinnfield's regulations contained vague authorizations of censorship like the policy in *Martinez* for "[d]angerous mail, including mail containing illicit materials, posing a security risk, misrepresenting conditions or events within the prison." *See* 416 U.S. at 399-400; JA 22. It also lacks an appeals process. JA 22.

Finally, applying *Turner* would not fit the context of this case. The litigants in *Turner* were prisoners at separate prisons. 482 U.S. at 81. The prison's policy in *Turner* allowed censorship of correspondence between non-family inmates. *See id.* at 81-82. It makes sense to censor outgoing mail that can affect the security concerns of another prison. It does not make sense to censor outgoing mail to religious organizations or news outlets that do not carry similar security concerns as is the case here because there is no danger to security within the walls of the prison. *See Thornburgh*, 490 U.S. at 411-12 ("[O]utgoing correspondence that magnifies grievances or contains inflammatory racial views cannot reasonably be expected to present a danger to the community *inside* the prison."). The factual context of *Turner* undermines its applicability in Pasha's case.

### C. Genuine Issues of Material Fact

Whether the court applies *Martinez* or *Turner*, it must decide whether genuine issues of material fact preclude summary judgment under FRCP 56(c). JA 15; Fed. R. Civ. P. 56(c). Pasha argues that there is a genuine issue of material fact on whether Pasha had other ways to free exercise under *Turner*.

#### *1. Other ways to free exercise open to Pasha under Turner*

Pasha argues that there were other ways to exercise his right to speech even under the *Turner* analysis. JA 10. Pasha says that Quinnfield could have spoken with the prisoner to edit the letter or redacted dangerous parts rather than censoring the entire letter. JA 10. Quinnfield points out that it only censored this letter, it did not censor other letters that Pasha sent. JA 6. The District Court did not comment on this issue.

## IV. How the District Court is Right

The District Court's PLRA interpretation is correct. The most natural reading of the statute implies that any non-physical injury is barred from receiving compensatory damages. *See* § 1997e(e). The court should not read into the statute its own exception. *See Marbury*, 5 U.S. at 177; *Nishiie*, 996 F.3d at 1028. There are other ways to establish injuries for non-physical constitutional violations—punitive and nominal damages. *See Allah*, 226 F.3d at 250. Most circuits interpret the statute this way.

## V. How the District Court is Wrong

The District Court prematurely granted the Motion for Summary Judgment. The District Court erroneously applied the *Turner* standard of review. *See* JA 14 (reasoning that "*Martinez* does not create a separate test for outgoing mail, but rather fits into the *Turner* framework, which is broader and encompasses policies like the one in this case."). But this contradicts the Court's reasoning in *Thornburgh*. *See* 490 U.S. at 411-12 (confining *Martinez* to outgoing mail censorship cases).

Petitioner argues that the security risk for outgoing mail is lower than the security risk of incoming mail and thus the policy is attenuated to the security concern. *See* JA 10. The District Court gives only a broad statement that the prison management complexities justify censorship. *See* JA 15. This reasoning does not address Petitioner's specific argument.

The District Court should have applied *Martinez* because (1) this is an outgoing mail censorship case, (2) the facts resemble *Martinez*, and (3) *Turner* does not fit the context of the case, and (4) the court need not establish a general standard based on this case. *See supra* Part III.B, at 6-9. The District Court must reconsider the case under *Martinez*.

The court found that Petitioner's claim fails to establish a genuine issue of material fact under the *Turner* standard. *See* JA 15. Though the court's analysis states the standard of review, it does not apply it. *See id*. Instead, the District Court discusses the policy's neutrality. JA 15. But neutrality is unrelated to the standard. *See* 482 U.S. at 89-91. The court observed that Petitioner does not challenge policy alternatives, but that is not where Petitioner takes issue. *See* JA 15; JA 10.

Petitioner argues Respondent could have redacted parts of the letter or spoken with Petitioner rather than censoring the letter without consultation. *See* JA 10. The District Court does not address this concern. Petitioner's argument could undermine Respondent's case under the second prong of *Turner*, so this is genuine issue of material fact. *See* Fed. R. Civ. P. 56(c).

Additionally, under *Martinez*, the question of whether the security interest involved is important or substantial remains. *See* 416 U.S. at 411. The District Court gave no reasoning for its decision to ignore *Martinez* except that it made the decision after "reviewing precedent, the parties' briefs, and the particular circumstances of th[e] case . . . ." JA 14. But these considerations can also lead to adopting *Martinez*. *See supra* Part III.B, at 6-9. The District Court also erroneously mischaracterizes *Martinez* as being co-extensive with *Turner*. The legal standards diverge from each other. *See supra* Part II.B.3, at 5.

## VI. CONCLUSION

We should affirm the District Court's ruling on the free-exercise claim under the PLRA, reverse its ruling adopting the *Turner* standard, and remand for further consideration on Pasha's genuine issues of material fact under *Martinez*.

## Applicant Details

| | |
|---|---|
| First Name | **Alexander** |
| Last Name | **Nowakowski** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **amn114@georgetown.edu** |
| Address | **Address**<br>Street<br>**12 Kensington Ct**<br>City<br>**Princeton**<br>State/Territory<br>**New Jersey**<br>Zip<br>**08540**<br>Country<br>**United States** |
| Contact Phone Number | **5708147164** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **George Washington University** |
| Date of BA/BS | **May 2016** |
| JD/LLB From | **Georgetown University Law Center**<br>**https://www.nalplawschools.org/employer_profile?FormID=961** |
| Date of JD/LLB | **May 22, 2022** |
| Class Rank | **School does not rank** |
| Does the law school have a Law Review/Journal? | **Yes** |
| Law Review/Journal | **No** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **Yes** |

| | |
|---|---|
| Post-graduate Judicial Law Clerk | **Yes** |

## Specialized Work Experience

## Recommenders

Mayer, Michael
michael_mayer@nyed.uscourts.gov
(330) 416-1535

Lopez, Jonathan
Jonathan.Lopez@allenovery.com
+1 202 683 3800

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

# ALEXANDER NOWAKOWSKI

12 Kensington Ct, Princeton, NJ 08540| (570) 814-7164 | amn114@georgetown.edu


May 24, 2023

Chambers of the Hon. Juan R. Sánchez
U.S. District Court
Eastern District of Pennsylvania
James A. Byrne U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Dear Chief Judge Sánchez:

I am writing to apply for a September 2024-25 term clerkship. I graduated *cum laude* from the Georgetown University Law Center and am currently clerking in the Eastern District of Texas for the Hon. Kimberly Priest Johnson, U.S. Magistrate Judge.

I have a specific interest in sentencing law and plan to pursue a career in federal prosecution, aspiring to work as an Assistant U.S. Attorney. As a judicial intern at the Eastern District of New York, I excelled writing fifteen Memorandum Opinion & Orders. I have continued to build on my judicial internship while working in the Eastern District of Texas, where I have drafted more than forty Report and Recommendations on a range of criminal and civil issues.

I am committed to public service, and my experience as an immigrant living throughout the United States has given me a special appreciation for the American judicial system. I have attached my resume, transcripts, and a writing sample. The writing sample is a draft memorandum & order involving a First Step Act petition written for the chambers of the Hon. Kiyo A. Matsumoto when I was a judicial intern.

The following are references in support of my application and welcome inquiries:

| | | |
|---|---|---|
| The Hon. Kimberly Priest Johnson<br>U.S. Magistrate Judge<br>U.S. District Court for the<br>Eastern District of Texas<br>(214) 872-4857 | Mr. Michael Mayer<br>Clerk to Hon. Matsumoto<br>michaelmayer87@gmail.com<br>(330) 416-1535 | Professor Christina Mathieson<br>National Habeas Institute<br>cm1855@georgetown.edu<br>(202) 887-4510 |

Thank you for your time and consideration.

Respectfully,

Alexander Nowakowski

**ALEXANDER NOWAKOWSKI**
12 Kensington Ct, Princeton, NJ 08540 • (570) 814-7164 • amn114@georgetown.edu

## EDUCATION

**GEORGETOWN UNIVERSITY LAW CENTER** — **Washington, DC**
Juris Doctor, *cum laude* — June 2022
GPA: 3.76
Activities: Institute of International Economic Law Fellow; Special Pro Bono Pledge Recognition; CALI Award (Habeas Corpus Post Conviction Practicum); Dean's List

**THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE** — **London, UK**
Master of Science, with Merit, in International Political Economy — December 2017
Dissertation: *The Bush and Obama Administrations in the WTO - A Comparative Study of Disputes*

**THE GEORGE WASHINGTON UNIVERSITY** — **Washington, DC**
Bachelor of Arts, *summa cum laude*, in Economics & International Affairs; German Studies Minor — May 2016
GPA: 3.85
Honors: Deans Honor List; Delta Phi Alpha (German National Honor Society)
Activities: GW Presidential Scholarship (2012-2016); GW UNICEF Journal Founding Editor (2015-2016)

## EXPERIENCE

**U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS** — **Plano, TX**
*Term Clerkship in the Chambers of the Hon. Kimberly C. Priest Johnson, U.S. Magistrate Judge* — Aug. 2022 – Aug. 2023

**U.S. SECURITIES AND EXCHANGE COMMISSION** — **Washington, DC**
*Enforcement Division Internship* — Jan. 2021 – Aug. 2021

- Supported "pump-and-dump," Foreign Corrupt Practices Act (FCPA), market manipulation, and insider trading investigations through document review, analysis, preparation of questions for witness testimony, and legal research

**U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK** — **New York, NY**
*Judicial Internship in the Chambers of the Hon. Kiyo A. Matsumoto* — May 2020 – Dec. 2020

- Drafted decisions on *habeas corpus* petitions to vacate or amend judgment
- Researched sentencing enhancement application and drafting First Step Act memorandum & order
- Drafted Memorandum & Orders for civil law cases including social security appeals, motions to dismiss, patent infringement, Fair Labor Standards Act, and labor disputes

**UBS** — **New York, NY**
*Global Equity Derivatives Compliance Officer/Group Risk Control Analyst, Graduate Rotational Training Program* — Aug. 2017 – June 2019

- Provided business-aligned compliance advisory to Derivative and Structured Product desks, and draft policy regarding Marijuana Related Businesses, complex trades, risk management, and regulatory change
- *Financial Crime Compliance:* Strategic management and analysis of relevant regulation for changes within the bank secrecy anti-money laundering program across the investment bank and Wealth Management
- *Leveraged Finance Credit Risk:* Performed credit analysis for leveraged financing origination within the Group Industrials & Consumer Products portfolio to provide challenge that ensures the investment bank remains within its risk appetite

**THE U.S. DEPARTMENT OF STATE** — **Washington, DC**
*Bureau of European and Eurasian Affairs, Southern Europe Office Internship* — March 2016 – June 2016

- Worked with Foreign Service Officers on Economic Portfolio of Turkey, Greece, and Cyprus including international trade promotion, Cyprus negotiations, environmental issues, and energy infrastructure development

**THE WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS** — **Washington, DC**
*Scholar Research Assistant Internship* — Aug. 2015 – Dec. 2015

- Researched International Trade issues with a focus on the Transatlantic Trade and Investment Partnership

**FREEDOM HOUSE** — **Washington, DC**
*Executive Office Internship* — June 2015 – Aug. 2015

- Drafted memoranda and articles with the President of Freedom House on economics and human rights

## CLEARANCES, LANGUAGES AND INTERESTS

Clearance and Languages: Secret (2016); German (Business Proficiency)
Interests: Kayaking; Tennis; Continental Philosophy; German Literature; Film studies

**Record of:** Alexander Maciej Nowakowski
**GUID:** 818841441

**Course Level:** Juris Doctor

**Degrees Awarded:**
Juris Doctor Jun 08, 2022
Georgetown University Law Center
Major: Law
Honors: Cum Laude

**Entering Program:**
Georgetown University Law Center
Juris Doctor
Major: Law

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2019** | | | | | | | |
| LAWJ | 001 | 91 | Civil Procedure<br>Charles Abernathy | 4.00 | B+ | 13.32 | |
| LAWJ | 004 | 13 | Constitutional Law I: The Federal System<br>Susan Bloch | 3.00 | B | 9.00 | |
| LAWJ | 005 | 13 | Legal Practice: Writing and Analysis<br>EunHee Han | 2.00 | IP | 0.00 | |
| LAWJ | 008 | 91 | Torts<br>Girardeau Spann | 4.00 | B+ | 13.32 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 11.00 | 11.00 | 35.64 | 3.24 |
| Cumulative | 11.00 | 11.00 | 35.64 | 3.24 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Spring 2020** | | | | | | | |
| LAWJ | 002 | 12 | Contracts<br>Michael Diamond | 4.00 | P | 0.00 | |
| LAWJ | 003 | 91 | Criminal Justice<br>Paul Butler | 4.00 | P | 0.00 | |
| LAWJ | 005 | 13 | Legal Practice: Writing and Analysis<br>EunHee Han | 4.00 | P | 0.00 | |
| LAWJ | 007 | 91 | Property<br>Michael Gottesman | 4.00 | P | 0.00 | |
| LAWJ | 1323 | 50 | International Law, National Security, and Human Rights<br>Milton Regan | 3.00 | P | 0.00 | |
| LAWJ | 611 | 13 | Questioning Witnesses In and Out of Court<br>Michael Williams | 1.00 | P | 0.00 | |

Mandatory P/F for Spring 2020 due to COVID19

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 20.00 | 0.00 | 0.00 | 0.00 |
| Annual | 29.00 | 11.00 | 35.64 | 3.24 |
| Cumulative | 31.00 | 11.00 | 35.64 | 3.24 |

----------Continued on Next Column----------

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2020** | | | | | | | |
| LAWJ | 1067 | 05 | English Legal History Sem<br>James Oldham | 3.00 | A | 12.00 | |
| LAWJ | 1085 | 05 | Sentencing Law and Policy<br>Mark MacDougall | 2.00 | A | 8.00 | |
| LAWJ | 121 | 01 | Corporations<br>Michael Diamond | 4.00 | A- | 14.68 | |
| LAWJ | 1491 | 03 | Externship I Seminar (J.D. Externship Program)<br>Alexander White | | NG | | |
| LAWJ | 1491 | 125 | ~Seminar<br>Alexander White | 1.00 | A | 4.00 | |
| LAWJ | 1491 | 127 | ~Fieldwork 3cr<br>Alexander White | 3.00 | P | 0.00 | |
| LAWJ | 1654 | 08 | The IMF and the Evolution of International Financial and Monetary Law<br>Sean Hagan | 3.00 | A- | 11.01 | |

Dean's List Fall 2020

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 16.00 | 13.00 | 49.69 | 3.82 |
| Cumulative | 47.00 | 24.00 | 85.33 | 3.56 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Spring 2021** | | | | | | | |
| LAWJ | 1191 | 08 | Sovereign Debt and Financial Stability Seminar<br>Anna Gelpern | 2.00 | A | 8.00 | |
| LAWJ | 1492 | 17 | Externship II Seminar (J.D. Externship Program)<br>Joanne Chan | | NG | | |
| LAWJ | 1492 | 86 | ~Seminar<br>Joanne Chan | 1.00 | A | 4.00 | |
| LAWJ | 1492 | 88 | ~Fieldwork 3cr<br>Joanne Chan | 3.00 | P | 0.00 | |
| LAWJ | 165 | 05 | Evidence<br>Paul Rothstein | 4.00 | P | 0.00 | |
| LAWJ | 215 | 07 | Constitutional Law II: Individual Rights and Liberties<br>Jeffrey Shulman | 4.00 | A- | 14.68 | |
| LAWJ | 361 | 01 | Professional Responsibility: The American Legal Profession in the 21st Century: Tech, Markets, & Reg<br>Tanina Rostain | 2.00 | A- | 7.34 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 16.00 | 9.00 | 34.02 | 3.78 |
| Annual | 32.00 | 22.00 | 83.71 | 3.81 |
| Cumulative | 63.00 | 33.00 | 119.35 | 3.62 |

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

**Record of:** Alexander Maciej Nowakowski
**GUID:** 818841441

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **---------- Fall 2021 ----------** | | | | | | | |
| LAWJ | 1167 | 05 | Anatomy of a Federal Criminal Trial: The Prosecution and Defense Perspective | 2.00 | A | 8.00 | |
| | | | Jonathan Lopez | | | | |
| LAWJ | 1527 | 05 | Habeas Corpus Post Conviction Practicum | 5.00 | A+ | 21.65 | |
| | | | Christina Mathieson | | | | |
| LAWJ | 196 | 05 | Free Press | 2.00 | A | 8.00 | |
| | | | Seth Berlin | | | | |
| LAWJ | 410 | 05 | State and Local Government Law | 3.00 | A | 12.00 | |
| | | | Sheila Foster | | | | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 12.00 | 12.00 | 49.65 | 4.14 |
| Cumulative | 75.00 | 45.00 | 169.00 | 3.76 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **---------- Spring 2022 ----------** | | | | | | | |
| LAWJ | 1712 | 09 | Advanced Evidence Seminar | 2.00 | A- | 7.34 | |
| | | | Michael Pardo | | | | |
| LAWJ | 1756 | 05 | Criminal Law Theory in Context | 2.00 | A | 8.00 | |
| | | | Rafael Reznic | | | | |
| LAWJ | 178 | 05 | Federal Courts and the Federal System | 3.00 | P | 0.00 | |
| | | | David Vladeck | | | | |
| LAWJ | 455 | 97 | Federal White Collar Crime | 3.00 | A- | 11.01 | |
| | | | Mark MacDougall | | | | |

**---------- Transcript Totals ----------**

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 10.00 | 7.00 | 26.35 | 3.76 |
| Annual | 22.00 | 19.00 | 76.00 | 4.00 |
| Cumulative | 85.00 | 52.00 | 195.35 | 3.76 |

**---------- End of Juris Doctor Record ----------**

May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to offer my highest recommendation in support of Alex Nowakowski's application for a judicial clerkship in your chambers. Alex worked as an intern for approximately seven months under my supervision in the chambers of Judge Kiyo Matsumoto in the Eastern District of New York. During that time, he demonstrated both the legal skill and temperament that would be required of an outstanding district court law clerk.

In Judge Matsumoto's chambers, we typically assign our interns the first drafts of opinions in social security appeals and habeas cases, but Alex quickly demonstrated the ability to work on more challenging cases. My co-clerks and I asked Alex to complete first drafts that were often some of our most difficult, including:

- An opinion to resolve a motion to de-certify a class and a cross-motion to amend the complaint in an FLSA case, shortly after the Second Circuit issued a decision clarifying the meaning of "similarly situated" plaintiffs, which required a novel analysis for purposes of the opinion;
- Findings of fact in a contract dispute with a lengthy procedural history; and
- Several opinions resolving unique habeas petitions, including ones brought by counsel, or by federal defendants pursuant to 28 U.S.C. § 2255.

Alex's most impressive work may have been a draft to resolve a First Step Act motion, in which a federal defendant sought a sentence reduction on several counts of conviction. The defendant was eligible for a sentence reduction on certain of his convictions, but the Second Circuit had not yet addressed whether his other convictions were eligible. Alex performed diligent research, and identified cases on point that the parties had not cited. Alex's draft grappled with all of the issues in a thoughtful way, and he turned in a polished first draft.

Alex's excellent work resulted in our decision to invite him to continue his internship through the fall of 2020, after he was initially hired for only the summer. He was an invaluable member of Judge Matsumoto's chambers, and I believe that he would be an outstanding law clerk.

Please let me know if I can provide any further information. I can be reached at
(330) 416-1535 or michael.r.mayer@aexp.com.

Sincerely,

Michael Mayer

ALLEN & OVERY

**Allen & Overy LLP**
1101 New York Avenue, NW
Washington, DC 20005

Tel +1 202 683 3800
Fax +1 202 683 3999
Direct line 2026833888
Mobile 3104972514
jonathan.lopez@allenovery.com

September 27, 2022

Re: Alexander Nowakowski - Letter of Recommendation

To Whom It May Concern,

I am writing in support of Alexander Nowakowski in connection with his application for a federal judicial clerkship. Mr. Nowakowski is inquisitive, intelligent, and hard-working and I recommend him without reservation.

I met Mr. Nowakowski in the fall of 2021 through a trial strategy course I teach at the Georgetown University Law Center as an Adjunct Professor. The course is loosely based on an Enron case I prosecuted at trial and is co-taught with the defense counsel from that trial. The course is designed to be an in-depth analysis of all stages of a white-collar federal criminal investigation and trial – using the Enron case as the hypothetical backdrop to guide the discussion.

Mr. Nowakowski stood out in the class not only because of his work product, but also because of his insightful and thought provoking class participation. Mr. Nowakowski was a consistent and active participant in class discussion and demonstrated through his many contributions that he had not only digested the materials for that particular class, but had also thought about how the materials tied into previous discussions. Mr. Nowakowski's comments often sparked further discussion amongst his classmates and helped us as adjunct professors create a more interesting learning environment.

Based on my knowledge and experience of Mr. Nowakowski, I fully support his candidacy for a clerkship. I have no doubt that his dedication to the task and his ability to decipher, synthesize, and apply legal concepts will be of great benefit to him and his co-workers in whatever setting he finds himself in next. If you have any questions regarding Mr. Nowakowski, please do not hesitate to call me at (310) 497-2514.

Sincerely,

Jonathan E. Lopez
Adjunct Professor
Georgetown University Law Center

**Alexander Nowakowski**
12 Kensington Ct, Princeton, NJ 08540
(570) 814-7164; amn114@georgetown.edu

**Writing Sample**

The attached writing sample is an excerpted Memorandum & Order in response to a First Step Act motion for a prisoner in federal custody within the Eastern District of New York. The defendant sought a sentence reduction for his narcotics distribution conspiracy conviction, and critically, his murder in the aid of racketeering conviction. The analysis below considers the defendant's eligibility for a sentence reduction under the First Step Act. This is draft is solely my unedited work product. Judge Kiyo A. Matsumoto's chambers has granted permission for this draft to be used as a writing sample.

**Legal Standard**

The United States Sentencing Commission issued four reports to Congress explaining that the ratio of 100 to 1 for crack-to-powder was too high and unjustified because sentences embodying this ratio "could not achieve the Sentencing Reform Act's 'uniformity' goal of treating like offenders alike, because they could not achieve the 'proportionality' goal of treating different offenders . . . differently, and because the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race based differences." *Dorsey v. United States*, 567 U.S. 260, 268 (2012) (citing *Kimbrough v. United States*, 552 U.S. 85, 97-98 (2007)). In response, Congress enacted the Fair Sentencing Act into law increasing "the drug amounts triggering mandatory minimums for crack trafficking offense from 5 grams to 28 grams in respect to the 5-year minimum and from 50 grams to 280 grams in respect to the

10-year minimum (while leaving powder at 500 grams and 5,000 grams respectively.)" *Id.* at 269.

"The First Step Act of 2018 'made retroactive the crack cocaine minimums in the Fair Sentencing Act.'" *United States v. Williams*, No. 03-CR-1334 (JPO), 2019 WL 2865226, at *2 (S.D.N.Y. July 3, 2019) (quoting *United states v. Rose*, No. 03-CR-1501, 2019 WL 2314479, at *2 (S.D.N.Y. May 24, 2019)). Section 404(b) of the First Step Act of 2018 states that "[a] court that imposed a sentence for a covered offense may, on motion of the defendant . . . impose a reduced sentence as if section 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018); *see also United States v. Holloway*, 956 F.3d 660, 664 (2d Cir. 2020). A "covered offense" is defined as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010." *Id.* § 404(a).

Further, "[r]elief under the First Step Act is discretionary," though "Section 404(c) places two limits on the court's resentencing power." *United States v. Simmons*, 375 F. Supp. 3d 379, 386 (E.D.N.Y. 2019). Section 404(c) states:

> LIMITATIONS.- No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits.

Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222 (2018).

In reviewing a motion for relief pursuant to the First Step Act, the court must first consider whether the defendant is eligible for a reduction in sentence and, if eligible, consider if such relief is warranted under the particular circumstances of the case "consider[ing] all the applicable factors under 18 U.S.C. § 3553(a), as well as defendant's post-sentencing conduct while in prison." *United States v. Williams*, No. 03-CR-795 (SJF), 2019 WL 3842597, at *4 (E.D.N.Y. Aug. 15, 2019) (collecting cases). "[T]he Second Circuit has cautioned that 'many defendants who are eligible for Section 404 relief may receive no substantial relief at all' [because] 'Section 404 relief is discretionary, after all, and a district judge may exercise that discretion and deny relief where appropriate.'" *United States v. Aller*, -- F. Supp. 3d --, 2020 WL 5494622 (S.D.N.Y. Sept. 11, 2020) (quoting *United States v. Johnson*, 961 F.3d at 191).

**Discussion**

Defendant moves for a modification of his sentence pursuant to the First Step Act regarding his conviction for engaging in narcotics distribution conspiracy, Count Forty-Seven; and murder in aid of racketeering, Count Eight. (*See generally* Mem.) The parties agree that defendant is eligible for a modification of his sentence regarding Count Forty-Seven, however the government opposes a sentence reduction regarding defendant's conviction for murder in aid of racketeering.

**I. Eligibility**

First, there is no question that defendant's narcotics distribution conspiracy conviction is a covered offense. The government "agrees that [defendant's] narcotics distribution conspiracy conviction is a 'covered offense' under the First Step Act . . . [b]ecause the statutory penalties for Section 841(b)(1)(A) [charged under Count Forty-Seven] were modified by Section Three of the Fair Sentencing Act . . . ." (Opp. at 5.) In finding that narcotics distribution conspiracy was a "'covered offense' within the meaning of Section 404(a)," the Second Circuit explained that "Section 2 of the Fair Sentencing Act modified the statutory penalties associated with a violation of those provisions by increasing Section 841(b)(1)(A)(iii)'s quantity threshold from 50 to 280 grams" and, "Section 2 thus modified – in the past tense – the penalties for [defendant's]

statutory offense . . . ." *United States v. Johnson*, 961 F.3d 181, 190-91 (2d Cir. 2020); *see also United States v. Martin*, 974 F.3d 124, 133 (2d Cir. 2020); *United States v. Burrell*, No. 97 CR 988-1 (RJD), 2020 WL 5014783, at *4 (E.D.N.Y. Aug. 25, 2020).

As defendant is unquestionably eligible for relief regarding his narcotics distribution conspiracy conviction, the court turns to defendant's murder in the aid of racketeering conviction. Here, the government sets forth its main challenge to defendant's First Step Act relief by stating "there is no legal or factual basis that warrants resentencing" as "[m]urder is not a covered offense." (Opp. 5.) In support, the government cites to *United States v. Barnett*, No. 90-cr-0913(LAP, No. 19-cv-0132(LAP), 2020 WL 137162, at *4-5 (S.D.N.Y. Jan. 13, 2020),[1] and *United States v. Potts*, 389 F. Supp. 3d 352, 355-56 (E.D.Pa. 2019), to state that murder in the aid of racketeering pursuant to 18 U.S.C. § 1959(a)(1) is not a "covered offense." (*Id.*) Defendant asserts, however, that *United States v. Jones*, No. 3:99-cr-264-6(VAB), 2019 WL 4933578,

[1] The *Barnett* district court states "that [defendant] is eligible for a sentence reduction on Count Three [possession with intent to distribute cocaine-base in violation of 21 U.S.C. § 841(b)(1)(C)] but is not eligible on Count One [conspiracy to distribute narcotics in violation of 21 U.S.C. § 846]" and that "any reduction of sentence would be purely academic because [defendant] remains subject to a life sentence on Count One." *Barnett*, 2020 WL 137162, at *4-5. This court does not find the reasoning of *Barnett* persuasive in light of *Johnson*'s discussion of 21 U.S.C. § 846 eligibility in rejecting the government's proposed limitations in reading the First Step Act. *Johnson*, 961 F.3d at 190 n.6.

(D. Conn. Oct. 7, 2019), and *United States v. Powell*, No.3:99-cr-264-18(VAB), 2019 WL 4889112, (D. Conn. 2019), provide for eligibility as the "individual life sentences for Racketeering and crack cocaine distribution . . . flowed from a single offense level and a single sentence guideline determination." (Mem. 16.)

In *United States v. Powell*, the defendant had been convicted of racketeering offenses, conspiracy to distribute cocaine base, obstruction of justice and witness tampering, and conspiracy to commit money laundering. 2019 WL 4889112, at *1. The *Powell* court found that because the defendant had been convicted of a "covered offense," the narcotics distribution conspiracy in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and 846, that the defendant was eligible for resentencing of his entire sentence because the racketeering offenses are "premised on violations of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)." *Id.* at 5. The *Powell* court further stated that the "RICO, RICO Conspiracy, obstruction of justice and witness tampering, and conspiracy to commit money laundering convictions thus were all addressed together, with the crack cocaine violation, as part of a single sentencing package, as inextricably related offenses." *Id.* at *8. (citing *United States v. Triestman*, 178 624, 630 (2d Cir. 1999)). Under the same logic, the *Powell* court found that the defendant in *United States v. Jones*, who had been convicted

of racketeering offenses and conspiracy to distribute to heroin and cocaine base in violation, was eligible for First Step Act relief. 2019 WL 4933578, at *4-5.

One court in the Eastern District of Michigan has characterized the *Powell* court's reasoning as the "one qualifies all" approach and has rejected its conclusions because a "bedrock principle of post-conviction procedure is that 'a district court may modify a defendant's sentence only as provided by statute.'" *United States v. Smith*, No. 04-90857, 2020 WL 3790370, at *10 (E.D. Mich. July 7, 2020) (quoting *United States v. Johnson*, 564 F.3d 419, 421 (6th Cir. 2009)) (brackets omitted). "Plainly, [Section 404(b)] indicates that the Court may only impose reduced sentence for a covered offense" and "[a]t the very least, Sec.404(b) does not *expressly permit* the Court reduce a sentence for a non-covered offense" while in contravention of "well-defined limits" placed on the power of a district court to modify a sentence "*Powell* assumed the court could reduce a sentence for a covered offense because Sec.404(b) did not *expressly prohibit* such a reduction." *Id.* (emphasis in original). Therefore, the *Smith* court found that the defendant was eligible and deserving of relief for the "covered offenses," but that the "First Step Act does not allow sentence reductions for non-covered offenses, such as [defendant's] continuing criminal enterprise conviction under §

848(a)" because, *inter* alia, the First Step Act must be read in conjunction with 18 U.S.C § 3582(c)(1)(B). *Id.* at *13.

While not cited by the parties, this court finds a recent decision within the Eastern District of New York taking issue with *Smith*'s conclusion that the continuing criminal enterprise conviction ("CCE") was not a covered offense to be persuasive to the extent that it provides the appropriate approach for considering eligibility. In *United States v. Burrell*, the defendant had been convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848(a) and moved pursuant to § 404 for First Step Act relief. 2020 WL 5014783, at *1. In *Johnson*, the Second Circuit explained that "it is the statute under which a defendant was convicted, not the defendant's actual conduct, that determine whether a defendant was sentenced for a 'covered offense' within the meaning of Section 404(a)." 961 F.3d at 187. In light of the Second Circuit's decision in *Johnson*, the *Burell* court reasoned that the "'covered offense'" discussion take place entirely *at the statutory level*" and, "[i]n this respect, CCE under § 848(a) and (c) is no less incomplete, or unconsummated, in 'describing a statutory offense' (to borrow *Johnson's* vocabulary) than the conspiracy statute." *Burell*, 2020 WL 5014783, at *7. "The 'statutory offense' known as CCE *can only be* fully stated by the interaction of Section 848 (a) and, in

the language of 848(c), the 'provision' of subchapter I or II of Title 21 that the defendant is charged with having continuously violated" and "one or more additional statutes must be part of identification of the statutory offense." *Id.* (emphasis added).

Further, *Burell* criticizes *Smith*'s conclusion that the CCE offense was not a covered offense because it required additional elements for a conviction even though the *Smith* court recognized that the jury must have concluded that the defendant violated § 841(a)(1) and § 846.[2] *Id.* at *6 (citing *Smith*, 2020 WL 3790370, at *12). The *Burell* court explains that its interlocking approach recognizes both the "practical" understanding of the manner in which cases are charged while fulfilling the "eligibility-*expanding*" guidance from the Second Circuit in discussing the conviction of covered offenses at the statutory level as a rejection of the government's arguments that the court should limit relief based on "actual conduct." *Id.* at 7-8 (emphasis in original).

This solution deftly threads the needle. Rather than focusing on the underlying conduct disavowed by the Second Circuit, *Burell*'s focus on the interaction of the statutes emphasizes that the CCE conviction is incomplete without the

[2] While the *Smith* court rejects the "underlying criminal conduct" approach, it appears to have considered that the defendant's enterprise dealt in both crack and powder cocaine to distinguish its reasoning from *United States v. Hall*, No. 2:93-cr-162(1), (E.D.Va. Mar. 2, 2020), in which that defendant dealt only in crack cocaine. *Smith*, 2020 WLE 3790370, at *13.

statutes that have been modified by the Fair Sentencing Act, 21 U.S.C. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, and therefore any modification to these statutes' penalties modifies the CCE conviction. Therefore, unlike *Powell*'s "one qualifies all" approach, *Burell*'s interlocking approach does not require consideration of any other conviction within a "sentencing package," *Powell*, 2019 WL 4889112, at *8, and determines on the statute alone if a sentence should be considered a covered offense pursuant to Section 404.[3]

Further, this reasoning, as opposed to the *Powell* court's "one-qualifies all" approach, is in line with the Second Circuit's recent decision in *United States v. Martin*. 974 F.3d 124 (2d Cir. 2020). In deciding if a defendant could receive a benefit for a "covered offense" already served for his subsequent convictions while in prison, the Second Circuit clarified that "[t]he explicit reference to sections 2 or 3 of the Fair Sentencing Act demonstrates that the First Step Act permits a sentencing reduction *only* to the extent that section 2 or 3 of the Fair Sentencing Act would apply" meaning that the "First Step Act permits a sentencing modification only to the extent the Fair Sentencing Act would have changed the

[3] The *Burrell* court explains that "to state that relation [between CCE and the violations of a covered statutory offense] does not dispose of the objection that CCE nevertheless remains a freestanding statute with its own penalty provision and that the narcotics conspiracy is 'underlying conduct' that *Johnson* says I am not to consider." *Burrell*, 2020 WL 5014783, at *5.

defendant's 'covered offense' sentence." *Id.* at 138 (emphasis in original). "[C]ourts require specific modification authorization – either due to a change in the guidelines ranges for a sentence on a particular count of conviction, or because a statute authorizes the reduction of a sentence - for *each* term of imprisonment contained in an otherwise final judgment of conviction." *Id.* at 137 (emphasis in original). Thus, the *Burrell* approach allows for modification of a sentence that can only be fully stated by its interaction with a "covered offense," without improperly considering those non-covered offenses that are not *each* subject to "specific modification authorization." *Id.*

Defendant cites to a recent Seventh Circuit decision, *United States v. Hudson*, 967 F.3d 605 (7th Cir. 2020), that has taken the "one qualifies" all approach and made clear that a defendant is eligible for First Step Act relief for non-covered offenses if he is convicted of any covered offense. (Mem. 17.) In reading Section 404(c) of the First Step Act, the Seventh Circuit states "[i]f Congress intended the Act not to apply when a covered offense is grouped with a non-covered offense, it could have included that language."[4] *Hudson*, 967 F.3d at 610-11.

[4] The Seventh Circuit finds further support for its approach from two Fourth Circuit decisions - *United States v. Gravatt*, 953 F.3d 258, 264 (4th Cir. 2020), and *United States v. Venable*, 943 F.3d 187, 193 (4th Cir. 2019). *See Hudson*, 967 F.3d at 610.

However, the Second Circuit has emphasized that 3852(c) must be read in conjunction with the First Step Act, which allows only those sentence modifications that are *expressly permitted*. *See Holloway*, 956 F.3d at 666 ("But a First Step Act motion is based on the Act's own explicit statutory authorization, rather than on any action of the Sentencing Commission. For this reason, such a motion falls within the scope of § 3582(c)(1)(B), which provides that a 'court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute.'"); *see also Martin*, 974 F.3d at 135-37.

Therefore, in applying the *Burrell* approach, this court does not find that it has the authority to modify defendant's murder in the aid of racketeering conviction as it can not be read as a covered offense pursuant to Section 404. 18 U.S.C. Section 1959 states:

> (a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—
>
> (1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years

> or for life, or a fine under this title, or both;
> . . .

18 U.S.C. § 1959. Murder in the aid of racketeering does not require interaction with any covered offense "to be fully stated." *Burrell*, 2020 WL 5014783, at *7. While dealing in controlled substances is one of the multiple crimes that may define a racketeering activity, this predicate applies to the "enterprise that engaged in racketeering activity," e.g. the drug gang, and not the defendant convicted under the statute. 18 U.S.C. § 1959. To find that the underlying conduct of the Mora organization's dealing of crack cocaine as an interlocking component to the murder in aid of racketeering offense does not serve the purposes the Fair Sentencing Act.

In *Johnson*, the Second Circuit discussed the government's anxiety that "if Section 404 eligibility turns on whether a defendant was sentence for violating a certain type of 'Federal criminal statute,' that [it] would lead to the *improbably broad* result that any defendant sentenced for violating Section 841(a), or even the Controlled Substances Act, would be eligible, because these could be understood as 'statutes' whose penalties were modified by Section 2 and 3 of the Fair Sentencing Act." 961 F.3d at 190 n.6. The Second Circuit stated that its analysis in the present case applied to

the 21 U.S.C. § 841(b)(1)(A)(iii), implying that it would not support such a broad approach. *Id.*

Thus, for the foregoing reasons, defendant is not eligible for relief pursuant to Section 404 in respect to his murder in the aid of racketeering conviction pursuant to U.S.C. § 1959(a)(1).

## Applicant Details

| | |
|---|---|
| First Name | **Patrick** |
| Middle Initial | **J** |
| Last Name | **Nugent** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **nugent2024@lawnet.ucla.edu** |
| Address | **Address**<br>Street<br>**11140 Rose Ave Apt 107**<br>City<br>**Los Angeles**<br>State/Territory<br>**California**<br>Zip<br>**90034**<br>Country<br>**United States** |
| Contact Phone Number | **2404000721** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Brown University** |
| Date of BA/BS | **May 2021** |
| JD/LLB From | **University of California at Los Angeles (UCLA) Law School**<br>**http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011** |
| Date of JD/LLB | **May 10, 2024** |
| Class Rank | **15%** |
| Law Review/ Journal | **Yes** |
| Journal(s) | **Indigenous Peoples' Journal of Law, Culture, and Resistance**<br>**UCLA Law Review** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **Pace Haub National Environmental Law Moot Court Competition** |

**UCLA Fall Internal Competition**
**UCLA Skye Donald Memorial 1L Competition**

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **Yes** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Horowitz, Cara
HOROWITZ@law.ucla.edu
(310) 206-4033
McKenna, Mark
mckenna@law.ucla.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Patrick Nugent (they/them)**
11140 Rose Ave Apt 107, Los Angeles, California 90034 | (240) 400-0721 | Nugent2024@lawnet.ucla.edu

June 16, 2023

The Honorable Juan R. Sanchez
United States District Court
For the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, Pennsylvania 19106

Re: Judicial Clerkship Application

Dear Chief Judge Sanchez:

I am a rising third-year law student at UCLA School of Law, and I am writing to apply for a position as a judicial clerk in your chambers for the 2024-2025 term. I chose a career in law because I have always felt a strong calling to public service, and I hope to begin my career by serving the people of Pennsylvania as a judicial clerk in your chambers. The chance to begin my career learning from your extensive career in public interest law makes me particularly excited to apply to your chambers. I also have a lot of family in Pennsylvania—my mother grew up in Carlisle and started her own career in Philadelphia after graduating from what was then Jefferson Medical College—and I would love to make the state my home after law school.

My experiences in both trial and appellate court settings have prepared me to be a strong contributor to your chambers and strengthened my desire to clerk at the district court level. As an extern for Judge David O. Carter last summer, I was able to hone my legal research and writing skills by drafting opinions and orders on myriad unfamiliar areas of law. Judge Carter's clerks gave me significant independence and responsibility, and I loved both the challenge and excitement of crafting a thorough order on a tight deadline. The pace and diversity of that work solidified my desire to clerk at the trial court level and I hope to bring those skills to bear delivering timely, high-quality work in your chambers. This spring semester I also worked with the Hualapai Tribe's Court of Appeals on bench memoranda and draft opinions, gaining further legal writing experience while navigating the nuances and difficulties of tribal court practice.

In addition, I have had the chance to strengthen my writing and organizational skills through journals at UCLA, evaluating legal writing as a Comments Editor on the *UCLA Law Review* and ensuring the accuracy of all citations as Managing Editor of the *Indigenous Peoples' Journal of Law, Culture, and Resistance*. My experience with moot court competitions has also allowed me to hone my writing and oral advocacy abilities. This year, I was very proud to be awarded Best Overall Brief during UCLA's fall internal competition and to be selected as a finalist in the Roscoe Pound Tournament of Champions.

Enclosed please find a copy of my resume, writing sample, and transcript, as well as letters of recommendation from Professors Cara Horowitz and Mark McKenna. Thank you for your time in considering my application, and I look forward to hearing from you.

Sincerely,

Patrick Nugent

# Patrick Nugent (they/them)

11140 Rose Avenue Apt 107, Los Angeles, California 90034 | (240) 400-0721 | Nugent2024@lawnet.ucla.edu


## EDUCATION

**UCLA School of Law**, Los Angeles, California
J.D. expected May 2024 | GPA: 3.82 (top 15%)

| | |
|---|---|
| *Honors*: | Masin Family Academic Excellence Gold Award – Highest scorer in Torts and Public Natural Resources Law<br>Masin Family Academic Excellence Silver Award – Second highest scorer in Environmental Law and Policy<br>Fall 2022 Internal Moot Court Competition – Best Overall Brief, Best Respondent |
| *Journals*: | UCLA Law Review, *Comments Editor*<br>Indigenous Peoples' Journal of Law, Culture, and Resistance, *Managing Editor* |
| *Moot Court*: | Roscoe Pound Moot Court Tournament of Champions 2023, *Finalist*<br>National Environmental Law Moot Court Competition, *UCLA Team Member*<br>1L Skye Donald Moot Court Competition, *Participant, Top 10% finisher* |
| *Pro Bono Research*: | HIV Criminalization in Maryland; California Judicial Diversity |
| *Specializations*: | David J. Epstein Program in Public Interest Law and Policy<br>Critical Race Studies Specialization \| Environmental Law Specialization |

**Brown University**, Providence, Rhode Island
A.B., *with Honors*, Religious Studies, May 2021 | GPA: 3.88

| | |
|---|---|
| *Thesis*: | *Jesus, Justice, and Jubilee: The Biblical Foundations of "Liberal" Protestant Anti-Poverty Work* |

## EXPERIENCE

**California Attorney General - Natural Resources Law Section** — Los Angeles, California
*Legal Intern* — Summer 2023

**UCLA Tribal Legal Development Clinic** — Los Angeles, California/Peach Springs, Arizona
*Student Participant* — Spring 2023

- Researched and drafted bench memoranda and orders in pending Hualapai Nation Court of Appeals cases
- Conferred with justices to determine the proper resolution of issues of first impression

**United States District Court, Central District of California** — Santa Ana, California
*Judicial Extern to the Honorable David O. Carter* — June 2022–August 2022

- Drafted orders on motions to dismiss, summary judgments, reconsiderations, and habeas petitions
- Prepared Judge Carter for oral arguments and drafted questions for parties

**El Centro VAWA/UVISA Clinic** — Los Angeles, California
*Volunteer* — Fall 2021–Spring 2022

- Interviewed undocumented survivors of violent crimes in Spanish and translated declarations for USCIS

**Tulsa County Public Defender's Office** — Tulsa, Oklahoma
*Intern* — June 2019–August 2019

- Reviewed police reports and cell phone logs for accuracy in pending death-penalty case

**Office of Residential Life, Brown University** — Providence, Rhode Island
*Residential Peer Leader (RA equivalent)* — August 2018–March 2020

- Oversaw two upperclassmen dormitories, once in a team and once as the sole RPL for sixty students

**Brown University Softball** — Providence, Rhode Island
*Video Coordinator* and *Manager* — February 2018–March 2020

- Travelled with the team and operated live pitch-capture software and camera equipment at all games

## LANGUAGES AND INTERESTS

Fluent in Spanish, conversational in Italian, novice in Scottish Gaelic, Duolingo beginner in Irish
Enjoy songwriting, online chess, South American literature, and watching baseball and softball

# University of California, Los Angeles
## LAW Student Copy Transcript Report



## Student Information

Name: NUGENT, PATRICK J
UCLA ID: 905668172
Date of Birth: 03/16/XXXX
Version: 08/2014 | SAITONE
Generation Date: June 07, 2023 | 05:51:32 PM
This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

## Program of Study

Admit Date: 08/23/2021
SCHOOL OF LAW
**Major:**
LAW
Specializing in CRITICAL RACE STUDIES

## Degrees | Certificates Awarded

None Awarded

## Graduate Degree Progress

SAW COMPLETED IN LAW 513, 23S

## Previous Degrees

None Reported

## California Residence Status

Resident

## Fall Semester 2021

**Major:**
LAW

| | | | | |
|---|---|---|---|---|
| CONTRACTS | LAW 100 | 4.0 | 13.2 | B+ |
| INTRO LEGL ANALYSIS | LAW 101 | 1.0 | 0.0 | P |
| LAWYERING SKILLS | LAW 108A | 2.0 | 0.0 | IP |
| Multiple Term - In Progress | | | | |
| TORTS | LAW 140 | 4.0 | 16.0 | A |
| CIVIL PROCEDURE | LAW 145 | 4.0 | 17.2 | A+ |

| | Atm | Psd | Pts | GPA |
|---|---|---|---|---|
| Term Total | 13.0 | 13.0 | 46.4 | 3.867 |

## Spring Semester 2022

| | | | | |
|---|---|---|---|---|
| LGL RSRCH & WRITING | LAW 108B | 5.0 | 18.5 | A- |
| End of Multiple Term Course | | | | |
| CRIMINAL LAW | LAW 120 | 4.0 | 14.8 | A- |
| PROPERTY | LAW 130 | 4.0 | 14.8 | A- |
| CONSTITUT LAW I | LAW 148 | 4.0 | 14.8 | A- |
| ENVIRONMNTL JUSTICE | LAW 165 | 1.0 | 0.0 | P |

| | Atm | Psd | Pts | GPA |
|---|---|---|---|---|
| Term Total | 18.0 | 18.0 | 62.9 | 3.700 |

## Fall Semester 2022

| | | | | |
|---|---|---|---|---|
| FEDERAL INDIAN LAW | LAW 267 | 3.0 | 9.9 | B+ |
| PUB NATURAL RESOURC | LAW 293 | 4.0 | 17.2 | A+ |
| ART&CULTURL PROP LW | LAW 301 | 3.0 | 0.0 | P |
| PROB SOLV PUB INT | LAW 541 | 3.0 | 12.0 | A |
| GEOGRPHICL INDICATN | LAW 561A | 0.5 | 0.0 | IP |
| Multiple Term - In Progress | | | | |
| CLIMATE CHANGE | LAW 591 | 3.0 | 12.0 | A |

| | Atm | Psd | Pts | GPA |
|---|---|---|---|---|
| Term Total | 16.0 | 16.0 | 51.1 | 3.931 |

## Spring Semester 2023

| | | | | |
|---|---|---|---|---|
| CRITCL RACE THEORY | LAW 266 | 4.0 | 13.2 | B+ |
| ENVIRONMENTAL LAW | LAW 290 | 4.0 | 16.0 | A |
| JOURNAL LEADERSHIP | LAW 347 | 1.0 | 0.0 | P |
| CALIF ENVIRNMNTL LW | LAW 513 | 3.0 | 12.0 | A |
| GEOGRPHICL INDICATN | LAW 561B | 1.0 | 0.0 | P |
| End of Multiple Term Course | | | | |
| TRIBAL LEGAL DEV | LAW 728 | 4.0 | 16.0 | A |

| | Atm | Psd | Pts | GPA |
|---|---|---|---|---|
| Term Total | 17.0 | 17.0 | 57.2 | 3.813 |

## LAW Totals

| | Atm | Psd | Pts | GPA |
|---|---|---|---|---|
| Pass/Unsatisfactory Total | 7.0 | 7.0 | N/a | N/a |
| Graded Total | 57.0 | 57.0 | N/a | N/a |
| Cumulative Total | 64.0 | 64.0 | 217.6 | 3.818 |

Total Completed Units 64.0

## Memorandum

Masin Family Academic Gold Award
TORTS, s. 7, 21F
RESIDENCE ESTABLISHED 8/10/2022
Masin Family Academic Gold Award
PUB NATURAL RESOURC, s. 1, 22F
Masin Family Academic Silver Award
ENVIRONMENTAL LAW, s. 1, 23S

END OF RECORD
NO ENTRIES BELOW THIS LINE

**UNIVERSITY OF CALIFORNIA, LOS ANGELES** **UCLA**

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

Cara Horowitz
Andrew Sabin Family Foundation Co-Executive Director
Emmett Institute on Climate Change and the Environment

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-4033
Email: horowitz@law.ucla.edu

February 28, 2023

To whom it may concern:

It is my great pleasure to give Patrick Nugent my strongest recommendation for a judicial clerkship. Patrick is a gifted researcher, writer, and legal thinker. In addition, Patrick is collaborative, unafraid of complexity, and a hard worker. They would be an asset to any chambers.

Patrick was a student in my climate law and policy seminar, an advanced discussion course that covers a broad swath of U.S. and international law and policy approaches to the problem of climate change. Their contributions in class demonstrated a strong grasp of the material and a genuine interest in engaging with new ideas and understanding complex issues. Patrick wrote three short papers for the class, including an especially strong one on potential litigation approaches to addressing the problem of "greenwashing," by which corporations deceive consumers through advertising that unduly bolsters eco credentials. Patrick's research and writing were outstanding; they were among the very strongest students in the class and received an "A". I am not at all surprised to learn that Patrick earned the highest grade in not one but two of their large, curved lecture classes.

Patrick has also contributed significantly to the law school community. They serve as an editor of two journals, including the UCLA Law Review, and also regularly participate in moot court competitions. ("Participate in" undersells Patrick's contributions, actually; I understand that they won Best Overall Brief and Best Respondent in our UCLA moot court competition.) They have volunteered to assist undocumented crime victims and to advance research into HIV criminalization.

I also want to say a word about Patrick's empathy and collegiality. I supervised Patrick and a classmate in a national moot court environmental competition earlier this year, for which Patrick and the teammate submitted an excellent brief. However, a couple of weeks before the team could participate in the oral argument portion of the competition, Patrick's teammate had to pull out for personal reasons, leaving Patrick no choice but also to withdraw. It was undoubtedly a disappointment to Patrick, who had worked hard to prepare and who would, I suspect, have done extremely well in the oral advocacy rounds. I know Patrick had been looking forward to the oral advocacy. But Patrick showed nothing but immediate support and understanding of the teammate's decision, easing (I'm sure) the teammate's considerable stress that week.

This is typical of my experiences with Patrick, who has shown maturity, generosity, and good grace in every interaction we've had. As we all know, such characteristics do not always come hand in hand with top-notch legal acumen; here, they do.

For all of these reasons, I give Patrick my highest recommendation. Please feel free to contact me if any additional information might be useful.

Sincerely,

Cara A. Horowitz

UCLA School of Law

MARK MCKENNA
PROFESSOR OF LAW
FACULTY CO-DIRECTOR, UCLA INSTITUTE FOR TECHNOLOGY, LAW & POLICY

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 267-4117
Email: mckenna@law.ucla.edu

June 7, 2023

Re: Letter of Recommendation for Patrick Nugent

Dear Judge:

This letter is to recommend Patrick Nugent for a clerkship position in your chambers. Based on my experience with Patrick, I am certain that they will be an excellent law clerk and ultimately an outstanding lawyer. I recommend them in the strongest terms.

I first became acquainted with Patrick when they were a student in my Torts class during the fall semester of 2021. Patrick was a regular and thoughtful participant in class discussions – not only when I called on them, but also on many occasions when they volunteered and responded their classmates' comments. Patrick routinely asked questions that went to the heart of an issue and probed the purposes of the legal rules, often with the goal of connecting various topics in the class. It was very clear that his classmates saw Patrick an intellectual leader in the class. When the class got stuck on something, they often were eager to hear what Patrick thought, and they took Patrick's comments seriously in formulating their own responses.

Unsurprisingly, Patrick did very well on the final exam, earning the highest grade in strong class. In recognition of Patrick's achievement, they the Academic Excellence Gold Award for the class (given to the student with the highest grade in a curved class). Patrick's overall performance so far in law school (a cumulative GPA of 3.818) has been equally strong. While UCLA does not formally rank students, I can tell you that UCLA adheres to a grading policy that strictly limits the number of A/A+ grades that can be given in any particular course. Specifically, faculty members cannot give A or A+ grades to more than 20% of students in any first year or large upper-division course. (Here I will note that it is remarkable that Patrick has earned A+ grades in two courses. While faculty differ in their willingness to give A+ grades, I understand them to be pretty rare. I have never given a student an A+ in 20 years of teaching.) I have no doubt that Patrick's academic performance will continue the rest of their law school career.

Given Patrick's outstanding performance in my Torts class, I was delighted when they and several of their classmates registered for a small seminar that I am co-teaching over the course of this academic year. Ours is one of UCLA's Perspectives courses—courses that focus primarily on a range of perspectives

on law rather than on specific doctrinal rules. These seminars meet semi-regularly over the course of the year, and they are discussion heavy. Our class focuses on geographical indications as a way of talking about the role of place and culture in legal traditions. Here too, Patrick has been an extremely thoughtful and regular participant. Patrick has continued to play the role of intellectual leader, even while making sure to leave plenty of room for his classmates' interventions.

As you can see from Patrick's resume, they are very interested in public interest lawyering, and Patrick has already demonstrated a commitment to working in areas they are passionate about. In Patrick's first year and a half in law school, they have already volunteered with the El Centro VAWA/UVISA Clinic and participated in the UCLA Tribal Legal Development Clinic. Prior to coming to law school, Patrick interned at the Tulsa County Public Defender's Office. I know from our conversations that public interest work will always be a priority for Patrick, whether that is in a full-time position or an active pro bono practice. Patrick wants a strong clerkship opportunity in part so that they can continue to use their legal skills to the benefit of others.

I should also say that, on a personal note, I am confident that you would really enjoy working with Patrick. They are super smart, but also humble and very well-rounded. Those traits will serve Patrick well as a clerk and as a lawyer. I strongly recommend them. If you have any questions, please do not hesitate to contact me at (310) 267-4117 or at mckenna@law.ucla.edu.

Sincerely,

Mark McKenna
Faculty Co-Director, UCLA Institute of Technology, Law & Policy

**Patrick Nugent (they/them)**
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I prepared the following excerpted brief as part of UCLA's team for the 2023 Jeffrey G. Miller National Environmental Law Moot Court Competition. The competition problem consisted of four questions arising from a three-party suit under the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA. My partner and I, representing the EPA, chose two questions each and drafted our sections independently of each other. The questions presented in my portion were:

1. Did the District Court err when it determined that costs incurred by FAWS in sampling, testing, and analyzing well water samples of its members' private drinking water wells are not reimbursable as response costs under CERCLA?
2. Did the District Court err in retaining jurisdiction over FAWS' remaining state law tort claims after resolving the federal claims?

I drafted the initial statement of the case with relevant facts before my partner supplemented the section with additional facts pertaining to his issues: ARARS under CERCLA and EPA's decision to order additional remediation after reopening a consent decree. Having removed his arguments and facts, the condensed version below represents entirely my own work with no edits or feedback from anyone else.

## Statement of the Case

### I. NAS-T Contamination and the BELCO Action

Between 1973 and 1998, Appellant Better Living Corporation ("BELCO") manufactured Nitro-Acetate Titanium ("NAS-T") at a factory (the "Facility") in the town of Centerburg in the state of New Union. Record at 4-5. BELCO produced NAS-T as part of its production of LockSeal, a sealant patented by BELCO and manufactured by combining NAS-T with an activation agent. *Id.* Experts identified NAS-T as a probable human carcinogen in the 1980's and the Environmental Protection Agency ("EPA") used various studies to establish a Health Advisory Level ("HAL") of 10 parts per billion ("ppb") below which NAS-T is non-toxic to humans in drinking water. *Id.* at 6. EPA developed this HAL using a "significant margin of error" to safeguard human health, and NAS-T is not detectable by smell below 5 ppb. *Id.*

In January 2015, following reports of sour smelling water, the Centerburg County Department of Health ("DOH") conducted testing in the publicly owned and treated Centerburg Water Supply ("CWS"). *Id.* at 5-6. Following test results between 45 and 60 ppb, DOH advised Centerburg residents to stop drinking tap water in September 2015 and BELCO began supplying bottled water to residents. *Id.* at 6. New Union referred the matter to EPA in January 2016. *Id.*

Under EPA direction, BELCO investigated the contamination and discovered a plume of NAS-T in the Sandstone Aquifer—which feeds the CWS—caused by spills and an unlined lagoon at the Facility. *Id.* As part of this investigation, BELCO installed three lines of soil monitoring wells progressively further south and downgradient within the Sandstone Aquifer. *Id.* at 7. Finding that a line of wells installed 1.5 miles south of Centerburg returned no detectable amounts of NAS-T, EPA required no further wells be installed. *Id.* This last line of wells is a half mile north of Fartown, a community of 500 that is downgradient from Centerburg and whose residents also receive water from the Sandstone Aquifer via private wells. *Id.* at 5, 7.

BELCO's remedial investigation and feasibility study ("RI/FS") recommended excavation of soils at the Facility and filtration of the CWS. *Id.* at 6-7. After considering the RI/FS findings and public comments, EPA selected a cleanup plan for the Facility. *Id.* On June 30, 2017, EPA sued BELCO in Case No. 17-CV-1234 (the "BELCO Action"), and shortly thereafter entered a Consent Decree (the "CD") adopting a cleanup based on the RI/FS and requiring ongoing soil monitoring. *Id.* The district court approved the CD on August 28, 2017, and no citizens of Fartown or Centerburg objected at any point in the process. *Id.*

## II. The Environmental Rights Amendment

In November 2020, New Union added the Environmental Rights Amendment ("ERA") to its Constitution. *Id.* The ERA states: "Each and every person of this State shall have a fundamental right to clean air and clean water and to a healthful environment free from contaminants and pollutants caused by humans." N.U. Const. art. I, § 7. During debate on its passage, the amendment's sponsor characterized the ERA as a gap-filling law that allows for action on contamination from otherwise unregulated substances that "cause some type of harm." Addendum at 6. However, the sponsor was careful to note that "clean water" means "nonharmful," rather than free of *any* substances, given the beneficial additives also present in water. *Id.* at 4-5. He specifically stressed that, under the ERA, "clean" refers to water that will "not do injury" to those who consume it. *Id.* Additionally, when presented with a hypothetical regarding offensive smells from "trash trains," the sponsor indicated that the right to be free of offensive smells already exists in New Union and would not be affected by the ERA. *Id.* at 5-6.

## III. FAWS' Intervention

The monitoring wells that BELCO installed closest to Fartown returned consistent nondetects after their placement in late 2016 and early 2017, with the only exception being

detects of 5 and 6 ppb in January 2018—around half the HAL of 10 ppb. Record at 8. In February 2019, at the request of Fartown residents, DOH tested five wells in Fartown and detected no NAS-T. *Id.* Nevertheless, several residents requested EPA perform similar testing in May 2019. *Id.* Given the lengthy record of consistent nondetects, EPA declined. *Id.*

Following that refusal, in December 2019, 100 residents formed Fartown Association for Water Safety ("FAWS") and paid $21,500 to conduct their own testing and analysis of drinking water wells. *Id.* After taking 3 samples from each of 75 wells, that testing returned 120 nondetects, 51 results below 5 ppb, and 54 results between 5 and 8 ppb. *Id.* As of July 2021, no wells have ever tested above 8 ppb. *Id.* at 10. FAWS brought its self-initiated test results to EPA in May 2020 and requested the CD be reopened. *Id.* at 8. EPA again declined because the detections of NAS-T were so low and the reopener provisions of the CD so narrow. *Id.*

FAWS moved to intervene in the BELCO action and filed a separate suit—21-CV-1776 (the "FAWS Action")—against BELCO in August 2017, more than six years after DOH testing began in Centerburg. *Id.* at 10. The district court granted the motion to intervene on September 24, 2021, and consolidated the cases. *Id.* Discovery on all CERCLA claims finished on December 30, 2021, the parties moved and cross-moved for summary judgment on those claims, and FAWS moved to dismiss its remaining state law claims once the federal claims were resolved. *Id.* The district court entered judgment for BELCO on FAWS' claim for testing costs and exercised its discretion to retain jurisdiction over FAWS' remaining state law claims. *Id.*

## Argument

### I. BELCO Is Not Liable for FAWS' Testing Costs Because Those Costs Were Unauthorized and Duplicative of EPA's Previous Investigation When They Were Incurred, Rendering Them Unnecessary Under CERCLA

After years of consistent nondetects in the wells closest to Fartown, further nondetects in DOH's tests of Fartown wells, and EPA's repeated decisions not to conduct additional testing,

FAWS nevertheless contracted for its own expensive sampling of 75 wells in Fartown. Now, FAWS requests that BELCO be held responsible for those costs under CERCLA. As the district court correctly found, those costs were incurred while FAWS was not involved in the cleanup and was not authorized to duplicate EPA's prior investigations. Therefore, its costs were unnecessary and not recoverable under CERCLA.

To recover response costs under CERCLA, a plaintiff must establish that (1) the site in question is a "facility" as defined by CERCLA; (2) the defendant is a responsible party; (3) there has been a release or there is a threatened release of hazardous substances; and (4) the plaintiff has incurred costs in response to the release or threatened release. 42 U.S.C. § 9607(a); *Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008). The plaintiff must also show that costs incurred are "necessary" and "consistent with the national contingency plan." *Young v. United States*, 394 F.3d 858, 863 (10th Cir. 2005). The parties' only dispute here is whether FAWS' costs were necessary.

To be necessary, costs must be closely tied to an actual cleanup so that one party cannot unilaterally dump the costs of its unrelated actions onto another. *Id.* When an otherwise uninvolved third party incurs investigation costs in anticipation of litigation enforcing responsibilities under a consent decree, those costs are not closely tied to an actual cleanup and are not recoverable. *See Wilson Road Dev. Corp. v. Fronabarger Concreters, Inc.*, 209 F. Supp. 3d 1093, 1115-16 (E.D. Mo. 2016). Additionally, "'investigative costs incurred by a private party after the EPA has initiated a remedial investigation, unless authorized by the EPA' are not considered necessary because they are 'duplicative' of the work performed by EPA." *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997) (quoting *Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421, 1425 (E.D. Cal.

1993)) (string citations omitted). Once a party has notice that EPA is investigating and has not authorized additional investigations, any investigative costs incurred by that party are not recoverable. *Louisiana-Pacific*, 811 F. Supp. at 1425-26; *see also Krygoski Const. Co. v. City of Menominee*, 431 F. Supp. 2d 755, 766 (W.D. Mich. 2006) (finding costs unnecessary when plaintiff "did not undertake its testing and sampling activities pursuant to any government order" and the government "never ordered Krygoski to do anything" amid ongoing EPA remediation). It is immaterial whether the investigating party acted reasonably or in good faith, and the fact that EPA later requests and uses data from a duplicative investigation does not retroactively make that investigation necessary. *Louisiana-Pacific*, 811 F. Supp. at 1425; *Iron Mountain Mines*, 987 F. Supp. at 1272. As a question of fact, a determination that certain costs were unnecessary is reviewed for clear error. *United States v. Hardage*, 982 F.2d 1436, 1447-48 (10th Cir. 1992).

Here, FAWS incurred the costs at issue after BELCO had already conducted its RI/FS investigation and EPA had deemed existing monitoring sufficient—all while FAWS was uninvolved in the cleanup. There was no existing cleanup underway in Fartown and BELCO had been conducting monthly testing under EPA's direction for well over two years. In that time, the line of wells closest to Fartown had returned no detectable NAS-T save for two detections well below the HAL in January 2018—nearly two years before FAWS' sampling took place. As such, EPA consciously chose to conduct no further investigation and there was no existing cleanup in Fartown at the time. Additionally, no residents of Fartown objected to the RI/FS or CD while those processes were ongoing despite the opportunity for public comment.

Notwithstanding the consistent nondetects, DOH agreed to test five Fartown wells in February 2019 and again found no detectable NAS-T. Forging ahead despite this evidence that further investigation was unnecessary, Fartown residents asked EPA to order tests on Fartown's

wells in May 2019. EPA declined citing the repeated nondetects. Thus, from that moment, the Fartown residents explicitly knew that any investigation was both unauthorized by EPA and surplus to existing monitoring. They continued undeterred in anticipation of the instant litigation.

In December 2019, residents formed FAWS and retained Central Laboratories, Inc. to test wells in Fartown for NAS-T at a cost of $21,500. Though over half of the results returned nondetects and none of the samples returned a NAS-T concentration at or above the HAL, FAWS again asked EPA to order further investigations. Reasoning in part that the low levels of NAS-T did not warrant such an investigation, EPA once again declined. FAWS then intervened in the BELCO Action and brought suit separately to recover the costs of its investigations.

The fact that FAWS was not involved in the remediation efforts at the time of the sampling forecloses its ability to recover under CERCLA. Its investigation was not only not "closely tied" to the existing cleanup but undertaken completely separately. *Young*, 394 F.3d at 863. FAWS began testing after EPA declined to do so multiple times, with a clear end goal of bringing litigation against BELCO for additional remediation. Costs incurred in an attempt to compel action under an EPA-ordered consent decree are unnecessary if the party incurring them has been uninvolved in the remediation efforts. *See Wilson*, 209 F. Supp. 3d at 1116. No residents of Fartown objected to the CD when it was entered, nor were any of them parties to the BELCO Action. As such, while FAWS may be involved in the cleanup now, the situation *at the time* of sampling necessitates a finding that testing costs were unnecessary and unrecoverable.

FAWS argues that these costs were necessary because the sampling returned detectable amounts of NAS-T, but this misconstrues the law. Like the investigation in *Louisiana-Pacific*, FAWS' well sampling occurred *after* it knew EPA was investigating through the monitoring wells included in the CD, necessarily making any other investigation duplicative. As in *Krygoski*,

"the government never ordered [FAWS] to do anything," barring recovery for FAWS' investigation, regardless of its results. *Krygoski*, 431 F. Supp. 2d at 766. Additionally, as the district court explained, the fact that the testing returned some low levels of NAS-T and was later used by EPA does not affect the determination that costs were necessary *at the time* they were incurred. *See Iron Mountain Mines*, 987 F. Supp. at 1272. Allowing FAWS to recover its costs opens the door to double recoveries for *any* uninvolved party that undertakes unauthorized testing. Such a result would frustrate the spirit of CERCLA and undermine its directive that remediation be "cost-effective." *Louisiana-Pacific*, 811 F. Supp. at 1425

In sum, the district court correctly identified that the dispositive issue with respect to FAWS' testing costs is that they were not necessary *when they were incurred*. FAWS was neither part of EPA's existing monitoring and remediation efforts under the CD nor authorized to conduct its own investigation. Therefore, FAWS cannot foist the costs of its unsanctioned and duplicative investigation onto BELCO after the fact. It was not clear error for the district court to deny recovery of FAWS' unnecessary costs and this Court must affirm.

## II. The District Court Did Not Abuse Its Discretion in Retaining Jurisdiction Over FAWS State Law Claims Because the Court Has Invested Significant Time and Effort into the Case and Those Claims Presented No Novel Issues of State Law

Having resolved all federal claims, the district court then exercised its discretion under 28 U.S.C. § 1367 to retain jurisdiction over FAWS' state law negligence and nuisance claims against BELCO. Because of the years of time and effort already expended by the district court, the potential for proceedings inconsistent with the CD, and the fact that negligence and nuisance present no novel issues of state law, the district court opted not to dismiss the state claims. Courts review a decision to retain jurisdiction over state law claims for abuse of discretion. *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 738 (11th Cir. 2006).

Federal courts can hear state law claims that "are so related" to the federal claims at issue that the two constitute "the same case or controversy." 28 U.S.C. § 1367(a). This pendent jurisdiction can exist even when all federal claims have been resolved, and courts weigh *Gibbs* factors of "judicial economy, convenience, fairness, and comity" when deciding whether to retain jurisdiction over related state claims. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) (citing *United Mineworkers of Am. v. Gibbs*, 383 U.S. 715, 726-27 (1966)).

While courts will normally decline to retain state law claims following the resolution of the related federal claims, that decision "is neither absolute nor automatic." *Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302, 307 (5th Cir. 1991). Instead, "district courts 'enjoy wide latitude in determining whether or not to retain jurisdiction over state claims when all federal claims have been extinguished.'" *Hall v. Greystar Mgmt. Servs. LP*, 179 F. Supp. 3d 534, 536 (D. Md. 2016) (quoting *Shanaghan v. Cahill*, 58 F.3d 106, 110 (4th Cir. 1995)). In fact, when none of the *Gibbs* factors of judicial economy, convenience, fairness, and comity weigh against retention, it can be an abuse of discretion *not* to retain the state claims. *Newport*, 941 F.2d at 308.

Additionally, while federal courts avoid retaining jurisdiction over cases that present novel or complex issues of state law, "generally, state tort claims are not considered novel or complex." *Parker*, 468 F.3d at 743. Given the overlap common between federal environmental laws and state nuisance actions, plaintiffs such as FAWS "would ordinarily be expected to try them all in one proceeding." *Id.* at 747.

In the case at bar, the district court properly determined that the *Gibbs* factors weighed in favor of retaining jurisdiction and that FAWS' claims did not present novel issues of state law. The district court has already invested years into the BELCO action, approved and then reopened the CD related to NAS-T contamination, and completed significant discovery before deciding the

motions and cross-motions for summary judgment. Because FAWS' only remaining claims are straightforward nuisance and negligence claims arising from facts familiar to the district court, it was not an abuse of discretion to retain jurisdiction over those claims.

In *Hall*, the court exercised its discretion to retain state law claims, despite the fact that discovery had not begun and no trial date was set, because the court had already had the case for more than two years and was "intimately familiar" with the controversy. *Hall*, 179 F. Supp. 3d at 537. Similarly, in *Parker*, the Eleventh Circuit reversed a district court's discretionary decision *not* to retain jurisdiction over nuisance and negligence claims in a CERCLA action, citing the "substantial judicial resources" already committed to a four-year case. *Parker*, 468 F.3d at 746.

Here, the district court has already been involved in BELCO's cleanup of the Facility for four and a half years and completed discovery on all CERCLA claims. The court also solicited public comment on the CD, approved it, and has now reopened it—which will likely require further proceedings and judicial monitoring. Though FAWS argues that further discovery is needed on its state law claims, that does not negate the "tremendous amount of work" already completed by the district court, including significant overlapping discovery. Record at 15. Additionally, FAWS' request that the court order BELCO to install Cleanstripping on wells detecting NAS-T—an issue implicated in this Court's ultimate decisions on the CD and EPA's administrative actions—could potentially lead to a state court ordering actions inconsistent with the provisions of the CD if tried separately. Noting these concerns, in the interest of avoiding duplicative proceedings and maintaining fairness to BELCO and EPA, the district court exercised its discretionary authority to retain jurisdiction over FAWS' state law claims.

FAWS' last argument—that the ERA renders its tort claims inherently novel—is not supported by the case law or the ERA itself. First, as discussed above, state torts related to

CERCLA claims are not novel and should be tried together. *Parker*, 468 F.3d at 473, 476. Further, the ERA does not materially affect the outcome of FAWS' tort claims. Because of the nonexistent or minimal NAS-T detected in Fartown's wells, FAWS' claims involve nonharmful contamination with no consequences beyond a sour smell. As such, FAWS' rights are unchanged by the ERA, and its passage will have no effect on the outcome of FAWS' tort claims.

The sponsor of the ERA defined clean water as water that would "not do injury" while explicitly disclaiming that clean water meant H2O free of any other substances. Asked about the implications of the ERA on foul smells, the sponsor explained that the right to seek redress for such an issue already exists in New Union. The ERA thus does nothing to change the analysis in a straightforward tort case involving nonharmful water or unpleasant smells. No wells in Fartown have tested above 8 ppb, below the HAL danger level, meaning that the only consequence in Fartown is a sour smell. Accordingly, the ERA does not affect FAWS' ability to seek redress under state law and its passage does not magically create a novel issue. The district court is therefore more than competent to adjudicate FAWS' nuisance and negligence claims.

Given that such substantial time, effort, and investment has gone into—and will continue to go into—the BELCO Action, and that FAWS' tort claims present no novel or complex issues of state law despite the passage of the ERA, the district court did not abuse its discretion in retaining jurisdiction over the remaining state law claims. This Court should accordingly affirm.

**Conclusion**

For the foregoing reasons, this Court should affirm the district court's determination that BELCO is not liable for FAWS' testing and sampling costs and find that the district court's decision to retain jurisdiction over FAWS' state law claims was not an abuse of discretion.

## Applicant Details

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|---|---|
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| Contact Phone Number | **856-669-9882** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **American University** |
| Date of BA/BS | **May 2019** |
| JD/LLB From | **Washington University School of Law**<br>**http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014** |
| Date of JD/LLB | **May 12, 2024** |
| Class Rank | **20%** |
| Law Review/ Journal | **Yes** |
| Journal(s) | **Washington University Law Review** |
| Moot Court Experience | **Yes** |
| Moot Court Name(s) | **National Moot Court Team** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

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June 12, 2023

The Honorable Juan R. Sánchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1711

Dear Chief Judge Sánchez:

My name is Matt Nussbaum and I am writing to apply for a clerkship in your chambers, either beginning in 2024 or for your next available position. I am currently a rising third-year student at the Washington University School of Law, where I am an Executive Editor of the *Washington University Law Review* as well as a member of our National Moot Court team. I was born and raised right outside of Philadelphia, in Cherry Hill, New Jersey, and as such am particularly interested in clerking for you and having the opportunity to serve my home community.

Enclosed please find my résumé, transcript, and writing sample. The writing sample included is an appellate brief I wrote for my Appellate Advocacy course during the Fall 2022 semester. The following individuals are submitting letters of recommendation on my behalf and welcome inquiries in the meantime.

Professor Travis Crum
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Professor Rebecca
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Professor Cort VanOstran
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I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,

Matt Nussbaum

# Matthew J. Nussbaum

309 Johnson Avenue, Oaklyn, NJ | m.nussbaum@wustl.edu | 856.669.9882

## EDUCATION

**Washington University School of Law** May 2024
Juris Doctor Candidate Saint Louis, MO
GPA: 3.75 (Top 20% = 3.76)

*Washington University Law Review* – Vol. 101, Executive Editor; Vol. 100, Staff Editor
National Moot Court Team – 2023 Spong Invitational Runner-up; Best Respondent's Brief Award
Dean's List – Spring 2023; Fall 2022; Spring 2022
Research Assistant for Professor Kyle Rozema
American Constitution Society
Jewish Law Society – Board Member
Scholar in Law Award Recipient (merit-based)

**American University, School of Public Affairs** August 2020
Master of Public Administration, Public Financial Management Specialization Washington, DC

**American University, School of Public Affairs** May 2019
Bachelor of Arts in Economics and Bachelor of Arts in Political Science Washington, DC

*Thesis*: "Social Welfare Policy Analysis: How Collective Decisions are Made"
Alpha Epsilon Pi Fraternity – President
Teaching Assistant for Professor Mary Hansen – Principles of Microeconomics, Spring 2019

## EXPERIENCE

**Willkie Farr & Gallagher LLP** May 2023 – Present
*Summer Law Clerk* New York, NY

- Researching complex legal issues, such as the scope of the FTC's rulemaking authority and whether the agency's proposed ban of non-compete agreements violates the major questions doctrine
- Reviewing briefs for clarity and ensuring that all relevant facts are included

**United States Attorney's Office – District of New Jersey** May 2022 – July 2022
*Summer Legal Intern* Newark, NJ

- Researched and prepared briefs on a variety of legal issues, including compelled decryption and health care fraud, for Assistant United States Attorneys
- Assisted in trial preparation by transcribing wiretapped conversations and compiling relevant quotes for use in a show-and-tell presentation
- Aided with plea negotiation preparations in a deprivation of civil rights case by reviewing field interviews and formulating a compelling story of the case

**Andy Kim for Congress** September 2020 – November 2020
*Finance Assistant* Marlton, NJ

- Managed a team of seven finance interns on a successful Congressional campaign
- Organized fundraising and phone banking efforts for a campaign that raised over $2 million in Q3 without taking funds from corporate PACs
- Collaborated with Finance Director to organize a fundraising event that raised $25,000

## INTERESTS AND AFFILIATIONS

Sports fan (Mets, Steelers, and Penguins); Movies; Golf; Trivia; and Weightlifting.

# Washington University in St. Louis

## Office of the University Registrar



Record Of: **Nussbaum, Matthew**
Student ID Number: 503820

Current Programs Of Study:
JURIS DOCTOR

Transcript Issued 06/07/2023 To:

RECIPIENT AS DESIGNATED BY STUDENT

**Fall Semester 2021**

| | | | | |
|---|---|---|---|---|
| LEGAL RESEARCH METHODOLOGIES I | LAW | W74 500D | 0 | CIP |
| LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (DROBISH) | LAW | W74 500U | 2.0 | A |
| CONTRACTS (BAKER) | LAW | W74 501H | 4.0 | A- |
| CIVIL PROCEDURE (HOLLANDER-BLUMOFF) | LAW | W74 506M | 4.0 | A- |
| TORTS (ROZEMA) | LAW | W74 515L | 4.0 | A- |

Enrolled Units 14.0 Semester GPA 3.66 Cumulative Units 14.0 Cumulative GPA 3.66

**Spring Semester 2022**

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|---|---|---|---|---|
| LEGAL RESEARCH METHODOLOGIES II | LAW | W74 500E | 1.0 | P |
| LEGAL PRACTICE II: ADVOCACY (DROBISH) | LAW | W74 500Z | 2.0 | A |
| CRIMINAL LAW (KATZ) | LAW | W74 502S | 4.0 | A- |
| NEGOTIATION (NICKERSON) | LAW | W74 503J | 1.0 | CR |
| PROPERTY (DROBAK) | LAW | W74 507D | 4.0 | A |
| CONSTITUTIONAL LAW (CRUM) | LAW | W74 520R | 4.0 | A |

Enrolled Units 16.0 Semester GPA 3.80 Cumulative Units 30.0 Cumulative GPA 3.73

**Fall Semester 2022**

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|---|---|---|---|---|
| CORPORATIONS (FRANKENREITER) | LAW | W74 538W | 3.0 | A- |
| BUSINESS NEGOTIATION THEORY AND PRACTICE (REEVES) | LAW | W74 578L | 3.0 | A |
| FEDERAL COURTS (HOLLANDER-BLUMOFF) | LAW | W74 634G | 4.0 | A- |
| APPELLATE ADVOCACY (FINNERAN/VAN OSTRAN) | LAW | W74 660B | 3.0 | A |
| LAW REVIEW | LAW | W77 600S | 1.0 | CR |

Enrolled Units 14.0 Semester GPA 3.72 Cumulative Units 44.0 Cumulative GPA 3.73

**Spring Semester 2023**

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|---|---|---|---|---|
| INTERNATIONAL BUSINESS | MGT | B63 512 | 3.0 | A- |
| EVIDENCE (HARAWA) | LAW | W74 547N | 3.0 | A |
| ETHICS AND PROFESSIONALISM IN THE PRACTICE OF LAW (PRATZEL) | LAW | W74 562C | 2.0 | A |
| SECURITIES REGULATION (SELIGMAN) | LAW | W74 569C | 3.0 | A- |
| ANTITRUST (DROBAK) | LAW | W74 611C | 3.0 | A |
| NATIONAL MOOT COURT TEAM | LAW | W75 606P | 1.0 | CR |
| LAW REVIEW | LAW | W77 600S | 1.0 | CR |

Enrolled Units 16.0 Semester GPA 3.85 Cumulative Units 60.0 Cumulative GPA 3.75

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

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# Washington University in St. Louis

## Office of the University Registrar



Record Of: **Nussbaum, Matthew**
Student ID Number: 503820

**Spring Semester 2023**

**Remarks**

SP2023 FROM: OLIN SCHOOL OF BUSINESS LAW SCHOOL ELECTIVE 3.0 UNITS

**Distinctions, Prizes and Awards**

SP2022 DEAN'S LIST
FL2022 DEAN'S LIST

********** **END OF TRANSCRIPT** **********

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

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Degrees conferred by Washington University and current programs of study appear on the first page of the transcript. The Degrees Awarded section lists the date of award, the specific degree(s) awarded and the major field(s) of study.

Courses in which the student enrolled while at Washington University are listed in chronological order by semester, each on a separate line beginning with the course title followed by the academic department abbreviation, course number, credit hours, and grade.

Honors, awards, administrative actions, and transfer credit are listed at the end of the document under "Distinctions, Prizes and Awards" and "Remarks".

**Course Numbering System**
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Most schools within Washington University employ the grading and point values in the Standard column below. Other grading rubrics currently in use are listed separately. See www.registrar.wustl.edu for earlier grading scales, notably for the School of Law, Engineering prior to 2010, Social Work prior to 2009 and MBA programs prior to 1998. Some programs do not display GPA information on the transcript. Cumulative GPA and units may not fully describe the status of students enrolled in dual degree programs, particularly those from schools using different grading scales. Consult the specific school or program for additional information.

| Rating | Grade | Standard Points | Social Work |
|---|---|---|---|
| Superior | A+/A | 4 | 4 |
| | A- | 3.7 | 3.7 |
| | B+ | 3.3 | 3.3 |
| Good | B | 3 | 3 |
| | B- | 2.7 | 2.7 |
| | C+ | 2.3 | 2.3 |
| Average | C | 2 | 2 |
| | C- | 1.7 | 1.7 |
| | D+ | 1.3 | 0 |
| Passing | D | 1 | 0 |
| | D- | 0.7 | 0 |
| Failing | F | 0 | 0 |

| Grade | Law Values (Effective Class of 2013) |
|---|---|
| A+ | 4.00-4.30 |
| A | 3.76-3.94 |
| A- | 3.58-3.70 |
| B+ | 3.34-3.52 |
| B | 3.16-3.28 |
| B- | 3.04-3.10 |
| C+ | 2.92-2.98 |
| C | 2.80-2.86 |
| D | 2.74 |
| F | 2.50-2.68 |

| Additional Grade Notations | | | |
|---|---|---|---|
| AUD | Audit | NC/NCR/NCR# | No Credit |
| CIP | Course in Progress | NP | No Pass |
| CR/CR# | Credit | P/P# | Pass |
| E | Unusually High Distinction | PW | Permitted to Withdraw |
| F/F# | Fail | R | Course Repeated |
| H | Honors | RW | Required to Withdraw |
| HP | High Pass | RX | Reexamined in course |
| I | Incomplete | S | Satisfactory |
| IP | In Progress | U | Unsatisfactory |
| L | Successful Audit | W | Withdrawal |
| LP | Low Pass | X | No Exam Taken |
| N | No Grade Reported | Z | Unsuccessful Audit |

(revised 11/2020)


cvanostran@grgpc.com

April 13, 2023

Dear Judge:

I write to offer my support for Matt Nussbaum's application for a clerkship with your chambers. By way of background, I am a practicing litigator in St. Louis, Missouri. I spent two years as a Visiting Lecturer in Law at Washington University, where I remain an adjunct professor. I also coach Washington University's moot court team. I previously served as a law clerk to two U.S. District Judges in the Eastern District of Missouri, so I am intimately familiar with the unique skillset that is required of successful law clerks.

Matt is an impressive student. His thoughtfulness and confidence empower him to work collaboratively and advocate aggressively. He is smart, hardworking, and dedicated, and he will be an asset to your chambers.

I first came to know Matt during his time as a student in my Appellate Advocacy course in the fall of 2022. Matt was focused, engaged with the material, and one of the strongest oral advocates in the class. His ability to comprehend, criticize, and elaborate upon legal arguments in real time was impressive. Moreover, his remarkable work ethic assured strong performances behind the podium and in his written work. Outside of my class, Matt's impressive academic performance and credentials speak for themselves.

I next worked with Matt during the spring semester of this year as he prepared and competed with the moot court team at an inter-school competition in Virginia. Matt and his team were finalists in the competition, successfully completing numerous rounds of argument before imposing panels of state and federal judges. Matt's team also won the competition's best brief award—a testament to Matt's demonstrated abilities as a clear, concise legal writer.

I was most impressed not by the results of this competition, but by Matt's desire to go above and beyond what was required of him to guarantee success. He took his role on the team extremely seriously, often asking nuanced questions and putting in considerable time outside of scheduled practices. Again, his work ethic was on full display and played no small part in his team's success.

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Telephone: 314-241-5620 Toll Free: 800-451-2950 Facsimile: 314-241-4140 www.grgpc.com

I recommend Matt Nussbaum enthusiastically and without reservation. Let me know how else I might best advance his candidacy, and please feel free to contact me if I can be of additional assistance.

Yours sincerely,

Cort VanOstran, Esq.
Gray Ritter Graham P.C.
314.295.6040

Washington University in St. Louis
SCHOOL OF LAW

May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

RE: Recommendation for Matt Nussbaum

Dear Judge Sanchez:

I am writing to recommend my student, Matthew Nussbaum, who has applied for a clerkship in your chambers. As someone who clerked at all three levels of the federal judiciary, I am confident that Matt will be a great law clerk. He has my strong recommendation for your chambers.

I first got to know Matt when he took my Constitutional Law class in Spring 2022, where he earned an A based on his anonymously graded exam and class participation. Matt's exam was near the top of the pile. His two essay answers were especially strong. Matt wrote a thorough and balanced "memo-style" answer to a difficult and open question of constitutional law, namely whether *Katzenbach, Boerne*, or *Shelby County* supplies the governing standard for Congress's authority to pass a nationwide statute enforcing the Fifteenth Amendment. In addition, he wrote a very strong "big picture" response to a question about the proper role of historical gloss in constitutional interpretation.

Matt was very engaged in the class. He never hesitated to ask for clarifications when something was unclear, which, as a relatively new professor, was invaluable. And here's why: if Matt wasn't following what was going on, I suspected that the majority of his peers were even more lost. It was apparent that Matt was quite eager to learn more about constitutional law.

Beyond succeeding in my class, Matt has done well here at WashULaw. Matt is in the top quarter of the class, and he is on our National Moot Court team, where he won the Best Respondent's Brief Award. Matt also has a penchant for leadership roles. He is Executive Editor of the *Washington University Law Review* and a board member of the Jewish Law Society. In observing my students inside and outside of class, it is clear to me that Matt is a natural leader.

In addition, Matt has strong connections to New Jersey, where he grew up. Prior to law school, he worked on a New Jersey congressional campaign. For his 1L summer, he interned at the New Jersey U.S. Attorney's Office. His long-term goal is to return home and become an AUSA in that office. Indeed, I've spoken with Matt in depth about his desire to have a career in public service, and I predict that he will be a diligent and fair-minded public servant.

In my interactions with Matt, he has come across as intellectually curious, extraverted, and kindhearted. I have no doubt that he will help make chambers a friendly and pleasant place to work.

Please feel free to call or e-mail me if I can offer any further information. I can be reached at my office at 314-935-1612 or on my cell at 240-446-6705.

Best,

/s/

Travis Crum
*Associate Professor of Law*

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Travis Crum - crum@wustl.edu

Washington University in St. Louis
SCHOOL OF LAW

November 11, 2022

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

RE: Recommendation for Matt Nussbaum

Dear Judge Sanchez:

I am very pleased to recommend Matthew Nussbaum for a clerkship in your Chambers. Matt is just a delightful student – smart, thoughtful, conscientious, and engaged. I have complete confidence that he will excel as a clerk.

I had the pleasure of getting to know Matt last fall when he was a student in my first-year Civil Procedure section. I teach the class using the Socratic method, and also rely on volunteers. Matt was always well prepared and ready with a correct answer, and reliably asked important and incisive questions. Matt received an A- grade, just shy of a flat A, on our anonymously graded exam, demonstrating mastery of the material and a strong capacity to write well, analyze new facts, and apply doctrine correctly. Matt is also currently my student in Federal Courts, one of the most difficult in the law school curriculum, where we cover complex topics including justiciability doctrine, federal court jurisdiction and the scope of Congress's control thereof, non-Article III courts, sovereign immunity, and more. Matt has regularly distinguished himself in class discussion about these thorny issues, despite the class size of almost 90 students. He is the kind of stalwart student, always engaged, always well-prepared, who is exceptionally helpful to class discussion because he regularly provides a thoughtful and insightful perspective on the reading and course topics rather than just a simple regurgitation of case facts.

Given his very consistent academic performance, it is no surprise that Matt has the requisite legal acumen to be a fine clerk. However, Matt is delightful in person as well. He is straightforward and no-nonsense, while also respectful, warm, and personable. I am always delighted to see him in office hours, where he asks both clarifying questions about complexities in the doctrine and more theoretical questions that demonstrate his natural curiosity and his sophisticated approach to the course material.

In sum, Matt has every characteristic one might want in a law clerk. He is smart and committed to his studies, and he will certainly be an excellent colleague. I am very glad to offer my strong recommendation to you.

Best,

/s/

Rebecca Hollander-Blumoff
*Vice Dean for Research and Faculty Development*
*Professor of Law*

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

# Matthew J. Nussbaum

309 Johnson Avenue, Oaklyn, NJ | m.nussbaum@wustl.edu | 856.669.9882


## WRITING SAMPLE

The attached writing sample is an appellate brief I completed for my Appellate Advocacy course during my third semester of law school in the fall of 2022. I represented the appellant, Mr. Mark Worthy, in his appeal of a district court's denial of his motion for habeas corpus relief relating to a claim of ineffective assistance of counsel Mr. Worthy alleged to have received at the trial court. This appeal was made before the Eighth Circuit of Appeals. All parties and facts in this case are fictional.

I received the highest grade in my class for the argument section of this brief, which begins on page 5 of this document. This brief examines the jurisprudence surrounding *Strickland* claims of ineffective assistance of counsel, and the requirements of deficiency and prejudice. This assignment required me to find and analyze relevant case law and thus I performed the entirety of the legal research on my own. The brief is wholly my work and has incorporated minor stylistic feedback from my professor. For the sake of brevity, I have excluded the cover page, tables of contents and authorities, the questions presented for review, signature block, and the certificates of compliance and service. A complete version of this brief is available upon request.

## STATEMENT OF THE CASE

Mark Worthy was originally charged with honest services mail fraud in violation of 18 U.S.C. §§ 1341, 1346 on September 10, 2020. Mr. Worthy's indictment alleged that he, while serving as a city official, failed to "disclose to . . . any other agent of the City" that he possessed a minority ownership interest in a cleaning company to which he contracted certain public works projects. JA – 4. While Mr. Worthy did not receive any direct payments in return for the contracts, the government contended that his undisclosed self-dealing was in violation of federal law. Upon the advice of his counsel, Mr. Worthy pled guilty to the charge on November 13, 2020. On February 17, 2021, the United States District Court for the Eastern District of Missouri sentenced Mr. Worthy to 51 months of imprisonment, while still noting that Mr. Worthy's actions "may actually have saved [the city] money because of th[e] crime." JA – 20.

While incarcerated, Mr. Worthy learned of the Supreme Court's ruling in *Skilling v. United States*, 561 U.S. 358 (2010), which narrowed the definition of honest services fraud to exclude undisclosed self-dealing. Mr. Worthy promptly filed a motion for relief, alleging both that his conviction was unlawful because *Skilling* decriminalized his conduct and that he received ineffective assistance of counsel due to the fact that his trial attorney failed to mention the possibility of raising the *Skilling* argument. The government, in its response, argued that *Skilling* did not decriminalize Mr. Worthy's conduct. JA – 37–38. The district court converted Mr. Worthy's motion to a petition for habeas relief under 28 U.S.C. § 2255 and granted an evidentiary hearing on the second question of whether Mr. Worthy received ineffective assistance of counsel. JA – 40–43. Notably, the district court denied to address the claim that *Skilling* decriminalized his conduct by finding the argument was procedurally defaulted. JA – 42. The court raised this issue *sua sponte*, as the government did not raise this defense in its response. The record is silent on any

facts showing that the parties were made aware of the procedural default defense before the lower court ruled on it.

At the evidentiary hearing, Mr. Worthy's trial attorney admitted that he had not read *Skilling* at the time he was representing Mr. Worthy, even though he understood the case to be dealing with similar circumstances as those present in Mr. Worthy's case. JA – 50–51. Likewise, the attorney confessed he never mentioned the case or the potential defense to Mr. Worthy. JA – 56. During the hearing, Mr. Worthy fervently asserted that had he been aware the conduct for which he was being charged had been decriminalized, he would not have pled guilty to the charge. JA – 58, 61–62.

On May 3, 2022, the lower court denied Mr. Worthy's habeas motion. The lower court ruled that Mr. Worthy failed to meet his burden of "demonstrating that the outcome of the proceeding would have been different" had he been informed of *Skilling*. JA – 71. The court also found that Mr. Worthy's counsel was not unreasonable in failing to research and inform Mr. Worthy of potential defenses because doing so may have undermined counsel's chosen strategy to accept responsibilty and plead guilty. JA – 68–69. Not only did the district court deny Mr. Worthy's motion, but it also denied Mr. Worthy a certificate of appealability. JA – 71. On September 14, 2022 this Court granted Mr. Worthy a certificate of appealability on the issues of his ineffective assistance of counsel claim and the decision to deem the *Skilling* claim procedurally defaulted. JA – 77.

## SUMMARY OF THE ARGUMENT

The district court erred in finding that Mr. Worthy did not receive ineffective assistance of counsel at his initial trial. This Court has repeatedly applied the *Strickland* test, which Mr. Worthy satisfied by showing he was never informed of relevant case law and counsel's failure to inform

prejudiced Mr. Worthy's decision to plead guilty. The test is satisfied when counsel does not act within an objective standard of reasonableness. This was the case with Mr. Worthy's representation. Counsel did not research basic case law surrounding Mr. Worthy's case, evidenced by the fact that he never informed his client, or himself, of the Supreme Court holding in *Skilling v. United States*, which limited the circumstances under which one can be convicted of honest services fraud under 18 U.S.C. § 1346. Any reasonable counsel would have made himself aware of the case when dealing with a client charged under the same statute in similar factual circumstances.

The district court also improperly applied the *Strickland* test by requiring Mr. Worthy to prove definitively that he would not have pled guilty to the crime had he been properly informed by his counsel. Instead, this Court has held that the proper standard is whether there is a *reasonable probability* that the defendant would not have pled guilty had they not received ineffective assistance of counsel. Applying precedent and the *Strickland* test, which this Court has consistently applied since the *Strickland* decision, this Court should hold that a petitioner is not required to definitively show prejudice, and the lower court erred in doing so. Therefore, the district court's ruling should be reversed.

The district court also erred in declaring Mr. Worthy's claim that *Skilling* decriminalized his conduct to be procedurally defaulted. As this Court has repeatedly recognized, parties must be given fair notice and an opportunity to be heard when a court chooses to raise an issue *sua sponte*. The government, in failing to raise the issue in its response, implicitly waived the defense of procedural default. By addressing the procedural default defense in its order, the lower court raised the issue on its own volition. However, the district court did not follow the proper procedure this Court has outlined for raising issues *sua sponte*. Further, the procedural default defense was

overcome by Mr. Worthy's showing of cause and prejudice. Thus, Mr. Worthy's *Skilling* claim should have been heard and ruled upon by the lower court, regardless of whether this Court agrees with the merits of Mr. Worthy's *Skilling* claim. As such, the district court's order should be reversed and remanded for further proceedings to allow the parties to address the procedural default defense and evaluate Mr. Worthy's *Skilling* claim.

**ARGUMENT**

This Court should reverse the lower court's decision because Mr. Worthy properly showed that he received ineffective assistance of counsel in violation of his Sixth Amendment rights. To show ineffective assistance of counsel, one must prove that their counsel was deficient beyond an objective standard of reasonableness, and that the errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 688–92 (1984). Mr. Worthy has satisfied this test. The record shows that Mr. Worthy was never informed of key case law during his trial by his counsel, and had he been informed of that vital information he would not have pled guilty to the charge. JA – 50–56. Moreover, the district court erred in dismissing Mr. Worthy's *Skilling* claim as procedurally defaulted. The district court improperly entertained the affirmative defense of procedural default as the government failed to raise the defense in its response brief. When raising issues *sua sponte*, the court must provide both parties with fair notice and an opportunity to be heard. Since the lower court did not provide such notice and opportunity, its ruling on the issue was improper. Mr. Worthy therefore requests that the Court grant his habeas petition, but if the Court won't reverse we urge the Court to reverse and remand the lower court's judgment to have a proper ruling on Mr. Worthy's *Skilling* claim.

## I. THE DISTRICT COURT ERRED IN FINDING THAT WORTHY DID NOT SATISFY THE STRICKLAND TEST

In the Eighth Circuit, ineffective assistance of counsel claims are mixed questions of law and fact, which are reviewed *de novo*. *See United States v. Frausto*, 754 F.3d 640, 642 (8th Cir. 2014).

Ineffective assistance of counsel claims can be raised for the first time in a motion under 28 U.S.C. § 2255, which is the situation in the present case. *See Massaro v. United States*, 538 U.S. 500 (2003). To determine whether a criminal defendant has received ineffective assistance of counsel in violation of the Sixth Amendment, the defendant must show that their counsel did not act within an "objective standard of reasonableness", and that the alleged deficiencies were "prejudicial to the defense." *Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984).

In this case, Mr. Worthy's trial attorney's performance was not reasonable under prevailing professional norms, and as such failed to satisfy the highly deferential reasonable conduct standard. *See Mayfield v. United States*, 955 F.3d 707, 710–11 (8th Cir. 2020) (articulating the strong presumption that counsel's actions were reasonably professional). By not informing himself, and consequently Mr. Worthy, of particularly relevant case law which may have provided Mr. Worthy with a defense, he did not act with reasonably professional conduct. Moreover, the record shows that were it not for his counsel's deficient representation, Mr. Worthy would not have pled guilty to Count I, making the counsel's error 'prejudicial'. JA – 58; *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (defining the 'prejudice' prong in cases involving a guilty plea as a showing of reasonable probability that "but for counsel's errors" the defendant would not have pleaded guilty). With both *Strickland* prongs satisfied, the district court erred in denying Mr. Worthy's habeas motion and this Court should reverse the decision and grant Mr. Worthy habeas relief.

*A. Worthy's Trial Counsel Was Deficient in Not Making Himself Aware of Particularly Relevant Case Law*

To satisfy the first prong of the *Strickland* test – deficient performance – there must be a showing that counsel's performance was not reasonable as compared to the norms of the legal community. *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). While there is a wide range of competence within which proficient representation can fall, *Tollett v. Henderson*, 411 U.S. 258, 266 (1973), this Court has found numerous circumstances in which counsel's performance was deficient, *see Eldridge v. Atkins*, 665 F.2d 228 (8th Cir. 1981); *see also Garmon v. Lockhart*, 938 F.2d 120 (8th Cir. 1991). In *Strickland*, the Supreme Court declined to specify a specific test to determine reasonableness, and it offered no specific examples as to what definitively may or may not qualify as deficient performance. *Strickland*, 466 U.S. at 688–91. However, subsequent decisions by both the Supreme Court and this Court have shown a consistent pattern g that a failure to conduct basic legal research constitutes deficient representation. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law . . . combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."); *see also Mayfield v. United States*, 955 F.3d 707, 711 (8th Cir. 2020) ("Effective assistance requires the provision of reasonably informed advice on material issues.").

Mr. Wilburn admitted in his testimony that he had not read *Skilling v. United States*, 561 U.S. 358 (2010), at the time he was representing Mr. Worthy and advising him to accept the government's plea deal.[1] JA – 50. *Skilling* was decided years before Mr. Worthy was indicted, and so it was reasonable to expect Mr. Wilburn to be familiar with the ruling or at the very least have

[1] While Mr. Wilburn stated that he had since read the opinion in *Skilling* and did not believe it would have affected his advice, the *Strickland* deficient analysis is to be conducted by judging the counsel's actions at the time the advice was provided, not with the benefit of hindsight. *Strickland*, 466 U.S. at 689.

become familiar with the holding during his basic research for Mr. Worthy's case. Moreover, Mr. Wilburn admitted that he never even mentioned the case to his client and admits that he should have. JA – 56. *Skilling* construed 18 U.S.C. § 1346, the same charge levied against Mr. Worthy in Count I of the indictment, JA – 5, as only covering kickback and bribery schemes, *Skilling v. United States*, 561 U.S. 358 (2010). Notably, this does not cover cases involving a public official failing to disclose self-dealing. *Id.* at 410–14. That is precisely the action Mr. Worthy was improperly charged with. JA – 4.

Without addressing the merits of Mr. Worthy's *Skilling* claim, there is no question that the case was one of particular relevance and importance to Mr. Worthy's defense and any reasonable attorney would have performed the simple task of reading the case. Failing to perform the basic legal research required to understand *Skilling*, a seminal case defining the precise statute his client was being charged with violating, was deficient lawyering on the part of Mr. Wilburn under the framework that this Court has provided. The question is not whether Mr. Wilburn was reasonable in recommending Mr. Worthy accept the government's plea deal, but rather whether Mr. Wilburn was reasonable in not researching *Skilling* and deciding its relevance to the case. *See Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020) (noting that the relevant question in a deficiency determination refers to the process rather than the conclusion). Mr. Wilburn's failure to consider a *Skilling* defense was not good process, regardless of the final determination.

### *B. Had Worthy Been Properly Informed of Skilling by His Counsel, There Is a Reasonable Probability He Would Not Have Pleaded Guilty to the Charge*

The second prong of the *Strickland* ineffective assistance of counsel test – prejudice – is modified when used in the context of guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985). To succeed in an ineffective assistance of counsel claim, one must satisfy the prejudice requirement by showing that there is a "reasonable probability" they "would not have pleaded guilty" if not for

the errors of their counsel. *Id.* at 59. Reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). Similar to the deficiency analysis, this examination is to be conducted without "the tint of hindsight." *Cox v. Lockhart*, 970 F.2d 448, 455 (8th Cir. 1992).

Mr. Worthy contended multiple times during his testimony that he would not have accepted the government's plea deal had he been made aware of *Skilling* potentially deeming his conduct legal. JA – 58, 62. When asked directly what his action would have been had he been properly informed of *Skilling*, Mr. Worthy said "I wouldn't go to trial" even if it was against the recommendation of his lawyer. JA – 58. There is a reasonable probability that Mr. Worthy would not have pleaded guilty were it not for his counsel's ineffectiveness, as that is precisely what he told the government during the evidentiary hearing. As such, the prejudice prong was satisfied and this Court must reverse the district court's holding and grant Mr. Worthy's habeas petition.

### *C. The District Court Unreasonably Applied an Improper Reading of the* Strickland *Prejudice Prong by Requiring Worthy to Demonstrate Definitively That the Outcome Would Have Been Different*

As stated above, the second prong of the *Strickland* test in a habeas case involving a guilty plea is whether there is a "reasonable probability" that the defendant "would not have pleaded guilty" if their counsel had not erred. *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985). When the trial court's application of *Strickland* is "unreasonable" it must be reversed. *See Williams v. Taylor*, 529 U.S. 362, 409 (2000); *Wanatee v. Ault*, 259 F.3d 700, 703–04 (8th Cir. 2001).[2]

[2] While both *Williams* and *Wanatee* involve the review of state court findings in § 2254 proceedings, it is well settled that "precedents under § 2255 and under § 2254 may generally be used interchangeably." 3 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 623 (4th ed. 2022); *see also Davis v. United States*, 417 U.S. 333, 343–44 (1974).

The district court clearly erred in its application of the *Strickland* prejudice prong, applying the wrong standard. The court held that Worthy had "not met his burden of demonstrating that the outcome of the proceeding would have been different." JA – 71. However, the relevant rule under *Hill v. Lockhart* is whether the defendant has shown a "reasonable probability" that the outcome would have been different, not that the outcome would have definitively been different as the district court stated. *Hill*, 474 U.S. at 59. While the *Strickland* standard is not easy to meet, the court's wholly incorrect application of the rule cannot be deemed reasonable and as such the prejudice analysis must be reanalyzed and determined under the proper rule. *See Williams v. Roper*, 695 F.3d 825, 831–33 (8th Cir. 2012).

## II. THE DISTRICT COURT IMPROPERLY DISMISSED WORTHY'S CLAIM THAT *SKILLING* DECRIMINALIZED HIS CONDUCT AS PROCEDURALLY DEFAULTED

In this Court, district court findings of procedural default are reviewed *de novo*. *Harris v. Wallace*, 984 F.3d 641, 647 (8th Cir. 2021).

While generally in a § 2255 action any claim that was not raised properly at trial or on direct appeal is considered procedurally defaulted, there are some circumstances where a petitioner can have a claim that was not preserved heard in a habeas petition. *See Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that procedural default applies in habeas proceedings); *see Massaro v. United States*, 538 U.S. 500, 505–06 (2003) (articulating an exception to the general rule of procedural default for ineffective assistance of counsel). One such example is when the government waives the affirmative defense of procedural default, either explicitly or implicitly. *See Robinson v. Crist*, 278 F.3d 862, 865 (8th Cir. 2002). Another example is when a petitioner can show cause and prejudice. *Coleman v. Thompson*, 501 U.S. 722 (1991).